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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

THE AMERICAN TOBACCO COMPANY, TOBACCO WORKERS' INTERNATIONAL UNION, AND LOCAL 182 OF TOBACCO WORKERS' INTERNATIONAL UNION,

Petitioners,

v.

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR,

Respondents.

AMERICAN BRANDS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, The American Tobacco Company, a Division of American Brands, Inc., American Brands, Inc.[1], (hereinafter collectively "American"), Tobacco Workers' International Union and Local 182, Tobacco Workers' International Union (hereinafter collectively "the Unions") pray that a writ of certiorari issue to review the *en banc* judgment of the Court of Appeals for the Fourth Circuit in these cases.

QUESTION PRESENTED

Whether the immunity from Title VII liability given to bona fide seniority systems under § 703(h) applies to seniority systems instituted or revised after the effective date of Title VII?

[1] American Brands, Inc. has no parent, subsidiary or affiliate required to be reported under Sup. Ct. R. 28.1.

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OPINIONS BELOW

The *en banc* opinion of the Fourth Circuit as to which a writ of certiorari is sought is unofficially reported at 24 Fair Empl. Prac. Cas. 531 and is set forth in the appendix to this petition. Previous opinions of the Fourth Circuit in these cases are reported at 535 F.2d 257, *cert. denied*, 429 U.S. 920 (1976) (*"Patterson I"*), and 586 F.2d 300 (1978) (*"Patterson II"*). Previous opinions of the district court are unofficially reported at 8 Fair Empl. Prac. Cas. 778 (1974) (post-trial opinion on liability); 11 Fair Empl. Prac. Cas. 577 (1974) (opinion on relief); and 18 Fair Empl. Prac. Cas. 377 (1977) (order denying motion to reconsider and vacate prior findings of liability).

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1980. This petition is filed within ninety (90) days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 703(h) of Title VII provides (42 U.S.C. § 2000e-2(h)):

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor

shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 206(d)).

STATEMENT OF THE CASE

These are employment discrimination cases, consolidated for trial, in which the plaintiffs alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, at two separate plants of American located in Richmond, Virginia—the Virginia Branch and the Richmond Branch. Respondents John Patterson, et al., were plaintiffs in one case, a class action alleging race discrimination, and respondent Equal Employment Opportunity Commission was plaintiff in the other, alleging both race and sex discrimination. American was a defendant in both cases, as was Local 182 of Tobacco Workers' International Union.[2] Tobacco Workers' International Union was a defendant in the class action case only.

At trial, the district court found no post-Act discrimination in hiring and job assignment, but found that American's seniority system, although "facially fair and neutral," 8 Fair Empl. Prac. Cas. at 782, nevertheless violated Title VII be-

[2] At the direction of the court of appeals in *Patterson I*, Local 182 was dismissed from the *EEOC* case.

cause portions of the system perpetuated the effects of past discrimination in hiring and job assignment.[3] Found violative were (1) American's practice of separate seniority at the two plants with loss of accumulated seniority in the event of transfer, and (2) several lines of progression, in which, although promotions are awarded on the basis of seniority, only employees who have occupied the lower-level job are eligible to bid on the higher-level job. In *Patterson I* the Fourth Circuit affirmed this finding and this Court subsequently denied a petition for a writ of certiorari.

Thereafter, while these cases were on remand to the district court for back pay proceedings, this Court rendered its decisions in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). Petitioners thereupon moved for relief from the prior finding of liability on the ground that it could no longer stand in light of these decisions. The district court denied relief, but in *Patterson II*, a panel of the Fourth Circuit reversed as to the practice of separate seniority at each plant and remanded for a determination whether that practice is "bona fide" within the meaning of § 703(h). However, the panel, without discussion, failed to include the lines of progression within the scope of that remand.

On rehearing, the court *en banc*, as had the panel, remanded for a determination whether the practice of separate seniority at each plant is "bona fide." (App. at 11 to 12). However, the court did not similarly remand as to the lines of progression. Although the issue of whether the

[3] The district court also found that American's selection of supervisory personnel violated Title VII, a finding which the *en banc* court of appeals has now directed be reconsidered. (*See* App. at 13 to 19). The issues concerning the selection of supervisors are not involved in this petition.

lines of progression were a "seniority system" under § 703(h) had been briefed and argued before the court *en banc*, the court did not decide that question.[4] Rather, the majority of the court of appeals held that in its view "§ 703(h) simply has no application to American's job lines of progression policy, whether or not it be considered a 'seniority system' in the mode of its operation" (App. at 8), and held that "the immunity accorded seniority systems by § 703(h) . . . run[s] only to those systems in existence at the time of Title VII's effective date." (App. at 10).[5]

REASONS FOR GRANTING THE WRIT

I.

This Case Presents An Important Question Of Federal Law: The Applicability Of § 703(h) Of Title VII To Post-Act Seniority Systems

If allowed to prevail, the decision below interpreting § 703(h) of Title VII as having no application to seniority

[4] Curiously, the opinion of the court of appeals contains no reference whatsoever to this Court's ruling in *California Brewers Association* v. *Bryant*, 444 U.S. 598 (1980), the leading decision on what constitutes a "seniority system" under § 703(h). Although the *California Brewers* decision was rendered after oral argument occurred, the parties called it to the attention of the court many months before the *en banc* opinion issued.

[5] Notwithstanding the absence of any specific finding below, the court, *sua sponte*, found as a fact that the lines of progression first came into existence after the effective date of Title VII. (App. at 8 to 11). This finding was made even though the specific question as to when the lines of progression were first instituted had not been an issue at the trial, which occurred in 1974, years before this Court's decisions in *Teamsters* and *California Brewers*. As the dissenting opinion below indicates, there is a genuine factual dispute on the current record as to whether the lines of progression indeed antedated the effective date of Title VII (*see* dissenting opinion), and a remand for proper factual determination would have been appropriate. Solely for purposes of this petition, petitioners treat the lines of progression as having come into existence after Title VII's effective date.

systems instituted or revised after the effective date of Title VII will have a significant, negative impact on national labor policy and will adversely affect affirmative action. The interpretation is contrary to the express language of the statute and not supported by the legislative history of § 703(h).

A. The Decision Below Will Have A Chilling Effect On Labor Relations And Affirmative Action

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324, 352 (1977), held that "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII," even where such systems perpetuated the effects of pre-Act discrimination. *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), extended the holding of *Teamsters* to preclude Title VII challenges to seniority systems that perpetuated the effects of discriminatory *post*-Act practices that had not been the subject of a timely complaint.[8] Last Term, in *California Brewers Association* v. *Bryant*, 444 U.S. 598 (1980), the Court had occasion to clarify the meaning of the term "seniority system" as it appears in § 703(h). Therein, the Court indicated that the term should be liberally, not narrowly, construed in view of the backdrop to Title VII of the nation's long-standing labor policy recognizing diverse forms of seniority systems and the necessity of affording significant freedom in their creation. *Id.* at 608.

This case brings to the Court the opportunity to give further, needed guidance as to the meaning of § 703(h). By holding that "the immunity accorded seniority systems by § 703(h) [runs] only to those systems in existence at the

[8] *See California Brewers Association* v. *Bryant*, 444 U.S. 598, 600 n. 2 (1980).

time of Title VII's effective date" (App. at 10) and that § 703(h) "has no application to seniority systems instituted after the effective date of Title VII" (*id.* at 9 n.3), the majority of the *en banc* court of appeals has created uncertainty as to the application of this important federal law covering millions of employees and thousands of employers throughout the nation. As this Court has recognized, seniority in the collective bargaining context "lies at the core of our national labor policy. . . ." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 79 (1977). The uncertainty as to the status under Title VII of post-Act instituted or revised seniority systems clouds an area of such national importance that the question should be settled by this Court.

The adverse impact of the ruling below on labor relations cannot be over emphasized. In explaining its decision, the majority below stated that "[s]ystems initiated in the post-Act period must of course pass muster under the *Griggs* [disparate impact[1]] analysis in the same manner as other facially neutral policies or practices challenged as discriminatory in their consequences." (App. at 10 n.5). In *Teamsters, supra*, this Court noted that the critical distinction between claims of disparate treatment and claims of disparate impact is that "[p]roof of discriminatory motive is critical" in a claim of disparate treatment, while "[p]roof of discriminatory motive, we have held, is not required under a disparate impact theory." 431 U.S. at 335-36 n.15. The decision of the court of appeals to relegate post-Act seniority challenges to the *Griggs* disparate impact mode of analysis, rather than apply the *Teamsters* analysis requiring proof of purposeful discrimination, plainly signals an erroneous return to the pre-*Teamsters* line of cases that had routinely struck down seniority systems merely on the basis of perpetuation of past discrimination, regardless of the presence

[1] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

or absence of discriminatory motive. *See, e.g., Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

Carving out two such diverse tests under § 703(h), one applicable to pre-Act seniority systems and the other to post-Act initiated or revised seniority systems, is simply illogical and negates the "[s]ignificant freedom [which] must be afforded employers and unions to create differing seniority systems." *California Brewers, supra*, 444 U.S. at 608. Such negating effect flows from the *Griggs* disparate impact analysis, with its primary reliance on statistics[8] and its related difficult burden of establishing a business necessity defense[9] to meet such a statistical *prima facie* case. In order to be confident that a newly adopted seniority system or a revision to a pre-Act system would withstand such an analysis, management and labor would first have to be sure that the racial and sexual break down within departments, lines of progression or other employment units mirrored the relevant statistics. The fact that the initiation of the system or a revision thereto was void of any dis-

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[8] Plaintiff in a case alleging disparate impact invariably establishes a *prima facie* case through a statistical showing of imbalance. *See, e.g., United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

[9] Lower courts have held defendants to exacting standards under the business necessity test, *see United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971) and pre-*Teamsters* courts rarely upheld a seniority system pursuant to claims of business necessity. *See, e.g., United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 451 (5th Cir. 1971). *cert. denied sub nom, Brotherhood of Locomotive Engineers* v. *United States*, 406 U.S. 906 (1972) (" '[t]o be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals' "; quoting *United States* v. *Bethlehem Steel Corp.*, 446 F.2d at 662).

criminatory motive and could pass muster under the bona fide seniority system analysis enunciated by this Court in *Teamsters* would be irrelevant. The critical elements of national labor policy recognizing "the give and take of free collective bargaining . . . [and] the specific characteristics of a particular business or industry, . . ." *California Brewers, supra,* 444 U.S. at 608, would thus be substantially impaired.

Furthermore, the inevitable result of the pre-Act/post-Act dichotomy in the applicable analyses under § 703(h) would have an unfortunate, damaging effect on affirmative action. The majority below held § 703(h) inapplicable to all post-Act seniority system "change[s] and formalization[s] (*whether in favor of* or against *employee interests*) . . . ." (App. at 9 n. 4; emphasis added). As a consequence, changes in pre-Act seniority systems made after the effective date of Title VII, even though they benefit minorities covered by the Act, will be discouraged because such a change would consign the system to a *Griggs* analysis. Such systems will be retained in order to preserve § 703(h) protection and its bona fides analysis pursuant to *Teamsters.*

As the dissenters below accurately pointed out, even a post-Act change made "in favor of a class of black employees, will deprive the company and the union making the change from the benefit of a § 703(h) exemption." (App. at 49). Such prohibitive effect of the majority's ruling runs directly contrary to this Court's observation in *United Steelworkers of America, AFL-CIO-CLC* v. *Weber,* 443 U.S. 193, 204 (1979) (citing *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975)), that Title VII is "intended as a spur or catalyst to cause employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this

country's history." [10]

The restrictive principle announced below will disable collective bargaining in the important area of seniority. It will inhibit management and labor from adopting employment practices to meet a changing economy or industry. It will put a damper on good faith efforts made in the spirit of affirmative action to overcome vestiges of past discrimination. If allowed to stand, it will jeopardize hundreds of diverse seniority structures established or revised in American industry in the fifteen years since Title VII's enactment. For these reasons, the case presents an important question of federal law which should be settled by this Court.

B. Neither Statutory Language Nor Legislative History Supports The Court Of Appeals' Interpretation Of This Important Federal Law

The interpretation by the court of appeals holding § 703(h) inapplicable to seniority practices not in place at the time of Title VII's effective date is plainly inconsistent with the express language of the section and is not supported by its unusual legislative history. For this reason

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[10] The dissent recognized this conflict with *Weber* (App. at 49-50):

> That part of the majority opinion providing that a company and a union cannot alter a seniority system so as to make more favorable the conditions of employment of minority employees is directly contrary to *Weber*, I think. It requires a too strained construction of the statute to hold that a seniority system admittedly discriminatory in effect, as in *Teamsters*, is protected by § 703(h) so long as it remains unchanged, but if it is changed in favor of the minority employees, then the employer and the union lose their § 703(h) exemption.
>
> * * *
>
> Such a conclusion, I suggest may sound astonishing, yet that is precisely what the majority holds.

also, this important question of federal law should be settled by this Court.

On its face, this definitional section[11] makes no distinction between pre- and post-Act bona fide systems. Had Congress meant to cover one but not the other, it easily could have done so. But Congress did not choose such a course. Rather, Congress chose language which addresses *all* bona fide seniority systems.

The court of appeals, in ignoring the literal dictates of § 703(h), departed from the cardinal principle of statutory construction that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Products Safety Commission* v. *GTE Sylvania, Inc.* ___ U.S. ___, 100 S. Ct. 2051, 2056 (1980). A court "must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9 (1962). Where those words are clear and unequivocal on their face, as here, a court is "bound to operate within the framework of the words chosen by Congress. . . ." *Id.* at 10. The proper function of the court of appeals in this case was "to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam* v. *United States*, 340 U.S. 593, 596 (1951). That function was clearly not followed below.

The court of appeals did not point, nor could it point, to any equivocation or lack of clarity in the terms expressly

[11] In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 761 (1976), the Court stated that § 703(h) is definitional, its thrust "directed toward defining what is and is not an illegal discriminatory practice. . . ."

chosen by Congress. Rather, the court deviated from the plain language to effectively turn the section into a "savings" or "grandfather" clause, exempting pre but not post-Act systems, even though "it would be difficult to conceive of any more precise language Congress could have used to command" [13] coverage of all bona fide seniority systems.

As the dissenters below aptly observed, "Congress undoubtedly knows how to write a grandfather clause if it wishes, but in this case wrote an exception instead." (App. at 26 n.1). Indeed, the same Congress drafted and passed savings provisions in other parts of Title VII.[13] The natural inference is that § 703(h)'s clear lack of resemblance to typical savings clauses[14] was not unintentional.

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[12] *Richards* v. *United States, supra,* 369 U.S. at 9.

[13] For example, § 703(b) as enacted called for application of the "employer" definition of the Act on an annual step-down basis:

> . . . *Provided,* That *during the first year after the effective date* prescribed in subsection (a) of section 716, *persons having fewer than one hundred employees* (and their agents) shall not be considered employers, and, during the *second year* after such date, *persons having fewer than seventy-five employees* (and their agents) shall not be considered employers, and, during the *third year* after such date, *persons having fewer than fifty employees* (and their agents) *shall not be considered employers:* . . . (Emphasis added).

Section 701(e), as enacted, contained a similar step-down or savings definition for "labor organization."

[14] Savings or grandfather clauses are "calculated to prevent hardship by saving accrued rights and interests from the operation of a new rule." 2A Sutherland, *Statutory Construction* § 47.12 (4th ed. Supp. 1980). Such clauses invariably exempt an established class from new regulation so long as that class possessed certain characteristics by a date specified in the savings clause itself. *See, e.g.,* § 7(c) of the Transportation Act of 1958, 49 U.S.C. § 303, providing that "any person (or its predecessor in interest) [who] was in *bona fide* operation on May 1, 1958, over any route or routes or within any territory, . . ." could apply for an authorization to continue the operation that the applicant had previously performed. In *United States* v. *Citizens & S. Natl. Bank,* 422 U.S. 86, 108 (1975), the Court considered an archtypical savings provision to the Bank Holding Company Act, 12 U.S.C. § 1849(d), which stated (422 U.S. at 108):

Notwithstanding the unequivocal language of § 703(h) and its dissimilarity to any known savings clauses, the court of appeals believed its result was justified by the "legislative history," which it variously described as "conclusively demonstrat[ing]", "replete with indications," or at least "suggest[ing]" that post-Act systems were not intended to be encompassed by § 703(h). Even assuming for the sake of argument that the words of the section itself are somehow ambiguous on this score and that examination of the legislative history is appropriately warranted, that "history," such as it is, reveals no authoritative support for the interpretive conclusion below. At most, that "history" is of wholly ambiguous significance and falls far short of the showing needed to disregard the words Congress expressly employed.

This Court is no stranger to the circumstances preceding the adoption of § 703(h). *See Teamsters, supra,* 431 U.S. at 350-55; *Franks, supra,* 424 U.S. at 759-62 (noting the "unusual legislative history" of the section and "the absence of the usual legislative materials" surrounding its adoption). The court of appeals purported to find support for its conclusion in two pieces of this "history": (1) a memorandum prepared by Senators Clark and Case which in part stated that "Title VII has no effect on established seniority rights"; and (2) a memorandum prepared by the Justice Department which stated that "Title VII would

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(Cont. from preceding page)

> "Any acquisition, merger, or consolidation of the kind described in section 1842(a) of this title which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to July 1, 1966, shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 of Title 15 [§ 2 of the Sherman Act]."

The court in the instant case was without authority to transform § 703(h) into a savings clause absent such clear legislative direction.

have no effect on seniority rights existing at the time it takes effect." (App. at 10 n.5). Neither piece of "legislative history" can authoritatively support the conclusion reached by the court of appeals.

The documents relied on below were introduced into the record by Senator Clark on April 8, 1964, during the general debate on the bill passed by the House. They were drafted in response to criticisms of another Senator that the bill, which contained no analogue predecessor to the eventual § 703(h), would, *inter alia*, "undermine the vested rights of seniority; . . ." 110 Cong. Rec. 7206 (1964). "None of these documents [was] read on the floor of the Senate, and there was no discussion of their contents or of this specific seniority issue, then or thereafter." Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1611 (1969). Nearly eight weeks later, on May 26, following a number of bipartisan leadership conferences, the so-called Mansfield-Dirksen amendment was offered as a substitute for the entire bill. *See* Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Comm. L. Rev. 431, 445-46 (1966). One of a number of amendments appearing for the first time was § 703(h).

Congress plainly designed § 703(h) as a clarification or definitional provision of what is and is not an "unlawful employment practice" under § 703(a); it would have required no feat of legislative drafting skill to insert the terms "existing" or "established" before the statute's descriptive phrase, "bona fide seniority or merit system." That neither "established," "existing" nor any similar term of limitation appeared in § 703(h) when it was proposed many weeks after the introduction of the Clark and Case and Justice Department memoranda supports the view that the drafting

groups, and the Congress as a whole, specifically rejected any such limitation. Instead of the assumptions made by the majority below, it is much more logical to presume that Congress, in view of the national policy favoring collective bargaining and seniority, as recognized by this Court in *Hardison* and *California Brewers, supra*, intended § 703(h) to be applicable to all seniority systems and revisions thereto, whether instituted before or after the passage of the Act, so long as bona fide and not the result of an intention to discriminate.

Accordingly, the talismanic quality conferred by the court of appeals on the isolated references in the "legislative history" to "established" and "existing" seniority rights does not withstand close inspection, particularly where the clear words and ordinary meaning of the statute belie any such result. "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945). Petitioners submit that here there is no "clearly expressed legislative intention to the contrary" of the "language of the statute itself." *Consumer Products Safety Commission v. GTE Sylvania, Inc., supra*, ___ U.S. at ___, 100 S. Ct. at 2056.[18] In sum, the court of appeals plainly erred in divining a "legislative history" of nebulous foundation to justify an interpretation of § 703(h) which constitutes a blatant departure from the language of the section itself.

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[18] *See also United States* v. *Oregon*, 366 U.S. 643, 648 (1961) (isolated statements in the legislative history "have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute.").

II.
The Result Reached By The Court Of Appeals Conflicts In Principle With Decisions Of This Court And With A Substantial Number Of Lower Court Decisions

In holding § 703(h) inapplicable to post-Act seniority systems, the court of appeals adopted a restrictive and erroneously narrow interpretation. Such a construction, reached without benefit of briefing or argument below on that specific issue, represents a conflict in principle and approach with applicable decisions of this Court, and a substantial number of lower courts.

In *Teamsters*, the Court saw no distinction in § 703(h) between pre- and post-Act seniority practices, stating that "[s]ection 703(h) on its face immunizes *all* bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination." 431 U.S. at 348 n.30 (emphasis added).[16]

In *Evans*, the Court seemed to squarely reject the narrow principle announced below that § 703(h) has no application to post-Act practices (431 U.S. at 560):

> *The Court of Appeals read § 703(h) as* intended to bar an attack on a seniority system based on the consequences of discriminatory acts which occurred prior to the effective date of Title VII in 1965, but *having no application to such attacks based on acts occurring after 1965. This reading of § 703(h) is too narrow.* The statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory. But such a challenge to

[16] Petitioners do not claim that seniority systems are immune from attack. The result they urge to this Court, *i.e.*, analysis of post-1965 systems pursuant to the § 703(h) bona fides standard rather than the *Griggs* disparate impact analysis, would by no means ensure blanket immunity for such systems. It would remain for the lower courts to conduct evidentiary inquiries as to whether the practice "is not 'bona fide,' or . . . [if] differences in employment conditions that it has pro-

> a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of § 703(h). (Emphasis added; footnote omitted).

Hardison, supra, offers further support for petitioners' view that the Fourth Circuit has erroneously separated post-Act seniority practices from the ambit of § 703(h). In finding that an employer's duty to make "reasonable accommodation" to the religious needs of its employees did not require it to take steps inconsistent with its seniority system, the Court emphasized, without differentiating between pre-Act and post-Act practices, that "seniority systems are afforded special treatment under Title VII itself."[17] 432 U.S. at 81. There was no suggestion that the *Griggs* disparate impact analysis would apply to post but not to pre-Act seniority practices. Instead, *Hardison* endeavored to coalesce the earlier teachings of *Teamsters* and *Evans* and necessarily rejected the application of *Griggs* to seniority systems (432 U.S. at 82, 83 n.13):

(Cont. from preceding page)
duced are 'the result of an intention to discriminate because of race.' " *California Brewers, supra,* 444 U.S. at 611.

[17] This principle that seniority systems are given special treatment by the Act itself is of critical importance and was not properly appreciated by the court of appeals. Its statement that § 703(h) is a "quite narrow exception to Title VII's *general coverage* of *all 'conditions of employment'* " (App. at 9 n.4; emphasis added) is beside the point. Although § 703(h) applies to relatively few employment practices covered by Title VII, it does not follow that when an employment practice comes within the section, the protection provided by the section is to be narrowly applied. *Teamsters, Evans, Hardison* and *California Brewers* all instruct that when a practice comes within the ambit of the section, it is to be liberally, not narrowly, construed.

> . . . absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice *even if the system has some discriminatory consequences.*
>
> * * *
>
> . . . § 703(h) unequivocally mandates that there is no statutory violation *in the absence of a showing of discriminatory purpose.* See United Air Lines, Inc. v. Evans, 431 U.S. 553, 558-560, 52 L Ed 2d 571, 97 S Ct 1885 (1977) (emphasis added).

Most recently, in *California Brewers*, the Court accorded a similarly broad interpretation to § 703(h). There, the Court indicated that the definitional thrust of the term "seniority system" in § 703(h) was designed to be forward-looking, and not static. "Significant freedom," the Court stated, "must be afforded employers and unions to create differing seniority systems. . . ." 444 U.S. at 608. Such a prospective view of the statute would not be possible if any seniority system or revision initiated after the Act was subject to the *Griggs* disparate impact analysis rather than to the bona fides analysis under *Teamsters.*

The result reached by the court of appeals in this case conflicts with the principles articulated by this Court in the decisions noted above.

It mistakenly ignores the admonition in *Teamsters* that § 703(h) "on its face immunizes all bona fide seniority systems. . . ." 431 U.S. at 348 n.30. Section 703(h) immunizes *both* pre-Act and post-Act bona fide seniority systems, as well as post-Act revisions to such systems.

By construing § 703(h) as a "quite narrow exception" of no applicability to post-Act seniority practices, the court of appeals committed the same fundamental error in approach to § 703(h) as that squarely rejected by this Court in *Evans.* The decision below, unless corrected, would substitute for the holding of *Evans* a return to the perpetuation

concept of discrimination for all post-1965 seniority practices, regardless of how untimely a charge might be. This result would be plainly inconsistent with the teaching of *Evans* that an untimely challenged discriminatory act, even if perpetuated through the operation of a seniority system, is the "legal equivalent of a discriminatory act which occurred before the statute was passed" (431 U.S. at 558), so long as the seniority system is otherwise bona fide under § 703(h).

The conclusion below that the interest protected by § 703(h) extends only to "those seniority rights already vested in incumbent workers when Title VII went into effect" (App. at 10) is contrary to this Court's recognition in *Hardison* that all seniority systems are afforded special treatment under § 703(h), that there is no statutory violation in the absence of a showing of discriminatory purpose and that collective bargaining, which universally includes seniority provisions, "lies at the core of our national labor policy," 432 U.S. at 79. That conclusion is also contrary to the lesson of *California Brewers* that § 703(h) is to be broadly interpreted and is forward-looking in its application to seniority systems in order to assure that significant freedom is afforded in the creation of differing seniority systems. Noticeably absent from the considerations of the court of appeals is this Court's perception in *California Brewers* that in enacting § 703(h) (444 U.S. at 608):

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's *longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment.* It does not behoove a court to second-guess either

> that process or its products. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. (Emphasis added; citations omitted).

The decision of the Fourth Circuit conflicts in result with opinions of the Sixth and Eighth Circuits. These courts, when confronted with challenges to seniority systems either instituted or revised post-Act, analyzed those practices for presence or absence of bona fides rather than applying the *Griggs* disparate impact approach. *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); *Hameed* v. *Iron Workers*, ___ F.2d ___, 24 Fair Empl. Prac. Cas. 352 (8th Cir. 1980).[18]

Moreover, numerous district courts post-*Teamsters* have likewise reviewed post-Act seniority systems under bona fides analysis, requiring proof of discriminatory intent in the adoption or maintenance of a seniority system as a prerequisite for a finding of non bona fides.[19] Liability should

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[18] The Eighth Circuit, in *Hameed* v. *Iron Workers*, held that a referral seniority system initiated post-Act in a 1972 collective bargaining agreement "must be judged" under *Teamsters* and *Evans*, which "immunize bona fide seniority systems which have a disproportionate impact on blacks or other minorities, provided that any disparity is not the result of interntional [sic] discrimination." *Id.* at 360 (footnote and citations omitted). Contrary to the approach of the Fourth Circuit, the Eighth Circuit properly observed that "even if a disproportionate impact had been shown, the seniority system would not have been shown to be a prima facie violation of title [sic] VII because Teamsters immunizes seniority systems from attack under the disproportionate impact theories of Griggs." *Id.* at n.12.

In *Alexander* v. *Aero Lodge No. 735*, *supra*, the Sixth Circuit drew no distinction for § 703(h) purposes between pre- and post-Act seniority practices, and analyzed the latter under the bona fides test.

[19] *See, e.g., Johnson* v. *Burroughs Corp.*, No. 252 *Daily Lab. Rep.* (BNA) D-1 (December 31, 1980) (S.D. Fla. 1980) (seniority system instituted in 1974 at a plant which did not open until 1968

not be different depending on the locus of the action.

Given the frequent challenges to seniority practices, it is evident that conflicts between the decision below and principles stated by this Court and the results reached by the Sixth and Eighth Circuits and numerous district courts present an important and recurring issue that should be settled by this Court.

(Cont. from preceding page)
analyzed for bona fides under § 703(h); *Sanders* v. *Sherwin Williams Co.*, 495 F. Supp. 571, 575-77 (E.D. Mich. 1980) (pre-Act practices and post-Act revisions to seniority system analyzed for bona fides under § 703(h) notwithstanding claim of disparate impact); *Pate* v. *Transit District*, 21 Fair Empl. Prac. Cas. 1228, 1245 (N.D. Cal. 1979) ("[t]he seniority system *created* by collective bargaining agreements in effect . . . *during the period from 1968 through 1976*, because it applied equally to employees of all races, and was neither created nor maintained with a discriminatory purpose, was a *bona fide* seniority system" under § 703(h) (emphasis added)); *Edmondson* v. *United States Steel Corp.*, 20 Fair Empl. Prac. Cas. 1745, 1747 (N.D. Ala. 1979) (previous court-ordered seniority system established in May 1973 ruled bona fide under § 703(h) over claim of adverse impact); *Freeman* v. *Motor Convoy*, 20 Empl. Prac. Dec. ¶ 30,090 (N.D. Ga. 1979) (seniority system adopted in 1969 "when the shop and yard employees were organized" referred to a master for determination of bona fides under § 703(h)); *Edmonds v. S. Pac. Transp. Co.*, 19 Fair Empl. Cas. 1052 (N.D. Cal. 1979) (challenges to pre- and post-Act seniority system practices analyzed under the bona fides test of § 703(h)); *Griffin* v. *Copperweld Steel Co.*, 22 Fair Empl. Prac. Cas. 1112 (N.D. Ohio 1978) (post-Act revisions to seniority system reviewed for § 703(h) bona fides); *EEOC* v. *McCall Corp.*, 24 Fair Empl. Prac. Cas. 432, 436 (S.D. Ohio 1978), *aff'd sub nom, EEOC* v. *McCall Printing Corp.*, 24 Fair Empl. Prac. Cas. 437 (6th Cir. 1980) (1966 adjustment of line of progression incorporating workers without carryover seniority and challenged under perpetuation theory held bona fide under § 703(h) absent a showing of discriminatory purpose).

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Fourth Circuit.

Respectfully submitted,

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January 15, 1981

APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 78-1083

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR, EACH INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellees,

v.

THE AMERICAN TOBACCO COMPANY, A DIVISION OF AMERICAN BRANDS, INC.,

Appellant,

AND

TOBACCO WORKERS' INTERNATIONAL UNION AN UNINCORPORATED ASSOCIATION; ET AL.,

Defendant.

No. 78-1084

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR, EACH INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellees,

v.

App. 2

TOBACCO WORKERS' INTERNATIONAL UNION, AN UNINCORPORATED ASSOCIATION; LOCAL 182, TOBACCO WORKERS' INTERNATIONAL UNION, AN UNINCORPORATED ASSOCIATION,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Albert V. Bryan, Jr., District Judge.

Argued June 5, 1979. Decided November 18, 1980

Before HAYNSWORTH, Chief Judge, WINTER, BUTZNER, RUSSELL, WIDENER, HALL and PHILLIPS, Circuit Judges, sitting en banc.

Henry T. Wickham (John F. Kay, Jr., Stephen A. Northup, Mays, Valentine, Davenport & Moore, Paul G. Pennoyer, Jr., Arnold Henson, Bernard W. McCarthy, Chadbourne, Parke, Whiteside & Wolff on brief) for The American Tobacco Company, A Division of American Brands, Inc.; Jay J. Levit (James F. Carroll on brief) for Tobacco Workers' International Union and Local 182, Tobacco Workers' International Union; Henry L. Marsh, III (S. W. Tucker, Randall G. Johnson, John W. Scott, Jr., Hill, Tucker & Marsh; Jack Greenberg, Barry L. Goldstein, O. Peter Sherwood on brief) for John Patterson, et al.; Ramon V. Gomez, Equal Employment Opportunity Commission (Abner W. Sibal, General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Assistant General Counsel on brief) for Equal Employment Opportunity Commission.

PHILLIPS, Circuit Judge:

In these consolidated Title VII actions brought by EEOC and a class of black employees against American Tobacco Company (American) and Tobacco Workers' International Union (Union) alleging race and sex discrimination in hiring, promotion, transfer and other employment practices, the district court found violations and granted sweeping relief which, with modifications, was then approved by this court upon appeal. *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976). Following entry by the district court of a modified judgment in conformity with our mandate upon remand, the Supreme Court decided *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977); and *Hazelwood School District v. United States*, 433 U.S. 299 (1977). Asserting that these decisions constituted significant intervening changes in the law entitling them to equitable relief from the judgment, American and the Union moved under Fed. R. Civ. P. 60(b) for appropriate relief.[1] The district court denied the motion and this appeal by the defendant-movants followed. It was first heard by a panel of this court which decided that while *Evans* and *Hazelwood* did not entitle the movants to any relief from the judgment, *Team-*

[1] Defendants first moved for relief in this court, seeking a recall of mandate and an order directing the district court to vacate its modified judgment. The recall of mandate was denied on the authority of *Standard Oil Co. v. United States*, 429 U.S. 17 (1976), as not requisite to district court consideration of the motions for relief. Jt. Supp. App. 2, 3. Defendants then moved in the district court that the modified judgment be vacated and the complaints dismissed on the basis of the intervening decisions. While the motions did not identify the rule under which they were made, they are most appropriately treated as motions under Fed. R. Civ. P. 60(b)(5) for relief from a judgment certified as final for purposes of appeal under Fed. R. Civ. P. 54(b). Jt. App. 183-84.

sters might, and that remand for further proceedings in light of *Teamsters* was required. *Patterson v. American Tobacco Company*, 586 F.2d 300 (4th Cir. 1978).

Upon rehearing by the court *en banc*, we conclude that the decision in *Evans* did not entitle the defendants to any relief from the judgment but that the decisions in both *Teamsters* and *Hazelwood* may require relief whose specific form can only be determined by further proceedings in the district court. Accordingly we affirm in part and vacate and remand in part for further proceedings.

I

The factual background and protracted procedural history of these cases is adequately set out in our earlier opinion, 535 F.2d 257, and in the panel opinion withdrawn upon our *en banc* rehearing of the instant appeals, 586 F.2d 300. It need not be repeated in full here; specific details necessary to our discussion will suffice.

By way of general background, the essential features of the modified judgment from which relief by motion is now sought are here summarized. Based upon findings of violations by the defendants in transfer and promotion practices affecting non-supervisory employees and in the procedures by which supervisory employees were appointed, the judgment required American to: (1) post more definite written job descriptions when vacancies occurred; (2) eliminate lines of employment progression in six of nine job categories; (3) permit blacks in the prefabrication department in one branch to transfer to jobs in the fabrication department at another branch without losing seniority despite American's long-standing policy disallowing inter branch transfers with retention of company seniority; (4) make back-pay awards to employees unlawfully denied promo-

tions; and (5) develop and apply objective criteria for appointing supervisory personnel. Reserved for judgment and still pending for determination in the district court were the individual claims for restitutionary back pay awards.

The defendants contend that the cited Supreme Court decisions require relief in various ways from the further enforcement of the judgment. We consider the effect of each decision in order.

II
Teamsters

Defendants contend that *Teamsters* draws in question the continued validity of those portions of the challenged judgment finding American's branch seniority system and its job lines of progression policy violative of § 703(a) of Title VII and granting related relief. The branch seniority system[2] was found violative on the basis that by imposing, without justification of business necessity, loss of seniority upon employees transferring from the lower paying prefabrication department of one branch to the higher paying fabrication department of another branch, blacks and women had been effectively locked into the lower paying positions. 535 F.2d at 263-64, 271. The lines of progression policy was found violative of Title VII in respect of six of nine protected job lines because of its demonstrated disparate impact upon protected employees and the failure to show its justification by any business necessity. *Id.* at 264-65, 271.

The contention is that *Teamsters* has now revealed that both the branch seniority system and the job lines of progression policy are immunized against challenge by § 703(h) of Title VII because they are, within contempla-

[2] Frequently alluded to by the litigants as the "plantwide seniority system," essentially to distinguish it from the earlier departmental system that it supplanted in 1963.

tion of that section, "bona fide" seniority systems. We conclude that under *Teamsters* the branch seniority system must be held immune if bona fide within the meaning of § 703(h), and that this presents a factual issue requiring reconsideration by the district court. We further conclude that § 703(h) as interpreted in *Teamsters* has no application to the job lines of progression policy, so that no reconsideration of the finding of violation or of the relief granted in relation to this policy is required by *Teamsters*. Our reasons follow.

In pertinent part, § 703(h) provides that

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . ., provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(h).

When the original judgment was entered, affirmed on appeal and modified on remand, the view in this and other Circuits was, as expressed in *United States v. Chesapeake & Ohio Railway*, 471 F.2d 582, 587 (1972), that, notwithstanding § 703(h), "seniority systems which perpetuate past racial discrimination violate [Title VII]."

Teamsters expressly rejected that view, finding it belied by the legislative history of § 703(h) and holding instead that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination," 431 U.S. at 353-54. In holding the *Teamsters* seniority system immune under § 703(h), the Court emphasized that by literal terms of the statute a system's immunity depends upon its being "bona

fide," and specifically pointed to the statutory requirement that differences in treatment flowing from the system's application not be "the result of an intention to discriminate because of race." *Id.* at 353.

Because the bona fides of the *Teamsters* system was conceded, the *Teamsters* Court was not, however, required to give detailed attention to the criteria by which bona fides in a contested situation is now to be determined. The Court did point out that the system before it "did not *have its genesis* in racial discrimination, and . . . was negotiated and [had] been maintained *free of any illegal purpose.*" *Id.* at 356 [emphasis supplied]. Also emphasized were the facts that the system was facially neutral, applying alike to all employees, equally discouraging all from making intra-company transfers involving loss of seniority; and finally that the differences in employment conditions imposed by the system had a rational basis in the practices of the affected industry and were consistent with National Labor Board precedents. *Id.* at 355-56.

From this it is clear that the modified judgment in this case was entered under a misapprehension on the part of both the district court and this court as to the proper application of § 703(h) to claims of Title VII violation through the operation of seniority systems. At odds with our then understanding[,] lack of bona fides may not be rested solely upon a finding of perpetuation of pre-Act discrimination. *See Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978). Defendants are accordingly entitled to relief from that judgment to the extent the present or a reopened record shows that the "seniority system" therein found violative of Title VII is immune to challenge because "bona fide" within contemplation of § 703(h).

By their motions in the district court, the defendants contended that both the branch seniority system and the lines

of progression policy were now revealed to be immune under § 703(h) because their bona fides was manifest on the record. The district court, without differentiating between the two and apparently treating them as constituting together "the seniority system" in issue, held flatly that

> the seniority system of the defendants in this case is not a bona fide system under [*Teamsters*] not merely because it perpetuated Pre-Act discriminatory practices . . . but because this system operated right up to the day of trial in a discriminatory manner. [*Teamsters* citation omitted]. This system had a discriminatory genesis. [*Teamsters* citation omitted] The background of labor relations of this Company and the seniority system clearly shows this to be true. The record in this case clearly supports this finding.

Defendants, of course, challenge that conclusion. Because we consider that application of § 703(h) to the branch seniority system and to the lines of job progression policy respectively presents separate questions dictating different results, we take them up separately.

A.

We first conclude that § 703(h) simply has no application to American's job lines of progression policy, whether or not it be considered a "seniority system" in the mode of its operation.[8] This policy was not in effect at American in

[8] Plaintiffs have contended that 703(h) has no application to the job lines of progression policy because, as administered, the policy was not a seniority system within contemplation of § 703(h). Without challenging the proposition that the job lines of progression *may* constitute a 703(h) seniority system, *see Teamsters*, at 355 & n.41, the contention is that the only seniority system in effect at American was the plantwide (branch seniority) system; that it alone determined progression even within the job lines of progression

1965 when Title VII went into effect, but was only adopted in January 1968 in connection with American's general revision of its promotional policies. 535 F.2d at 263.[4]

We think that the legislative history of § 703(h), as exhaustively analyzed by the Supreme Court in *Teamsters* and

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adopted in 1968, there being no superimposed seniority system integral to this separate policy. Plaintiffs seek and find considerable support for this position in various formal representations made by American in this litigation that the job lines of progression policy was operated entirely on a plantwide seniority basis. This was not, however, a factual issue directly litigated in the case and the record as presently composed is ambiguous on it. In view of our stated basis for deciding that 703(h) has no application to seniority systems instituted after the effective date of Title VII, we need not address this as a possible alternative basis for decision.

[4] Judge Widener's dissenting opinion challenges this factual assertion, contending that this policy was demonstrably in effect prior to the effective date of Title VII in 1965. With all respect for his exhaustive search of the evidentiary record and for the fruits of that search in which he finds support for his challenge, we simply disagree with the inferences he draws and perhaps with the legal implication he derives from those inferences.

Without attempting here an exhaustive counteranalysis of the factual record, our perception is that while the informal rudiments of what is now described as a "job lines of progression policy" certainly existed before 1965, the stated procedures adopted by American in 1968 to control entry into and promotions within specifically identified job "lines" involved enough of change and formalization (whether in favor of or against employee interests) to constitute a *new* policy, or at least one so radically altered from prior unstructured procedures that it could not be considered simply a "routine application," *see Teamsters*, 431 U.S. at 352, of those pre1965 procedures. As indicated in text of this opinion, we construe § 703(h) as a quite narrow exception to Title VII's general coverage of all "conditions of employment," including of course promotional policies, the prime subject of all types of seniority systems. In line with that narrow interpretation, we consider that "routine application" should be given a stringent reading against any employer seeking the special insulation provided by § 703(h) for any seniority "system" alleged to have been in place when Title VII was enacted. On that basis, we conclude, as a panel of this court has long since assumed—without intervening challenge of fact or law—that within contemplation of § 703(h), the job lines of progression policy here in question only came into existence in 1968.

in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), conclusively demonstrates that Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act applications of such systems. *See Teamsters*, 431 U.S. at 352. That history is replete with indications that the interests sought to be protected by this special exception to Title VII's general coverage of all "conditions of employment" were those seniority rights already vested in incumbent workers when Title VII went into effect.[8]

[8] The applicability of § 703(h) to seniority systems initiated after the effective date of Title VII was not decided by *Teamsters*. *See* Note, 52 Tul. L. Rev. 397, 405 (1978). The EEOC position is that § 703(h) has no applicability to seniority systems not in operation at the effective date of Title VII. EEOC Notice N-915 (July 14, 1977), *reprinted in* EEOC Compliance Manual ¶ 6500. We need not here embrace in its entirety this EEOC interpretation of *Teamsters* to agree that the legislative history suggests that post-Act seniority systems were not intended to be included in the protection of § 703(h). A memorandum prepared by Senators Clark and Case stated in explanation of the intended effect of this section that "Title VII has no effect on established seniority rights." 110 Cong. Rec. 7213 (1964). The Justice Department noted that "Title VII would have no effect on seniority rights existing at the time it takes effect." *Id.* at 7207. In discussing this legislative history, the Supreme Court noted in *Teamsters* that Title VII would allow "full exercise of seniority accumulated before the effective date of the Act," 431 U.S. at 352, and that Congress did not intend to punish employees by destroying their "vested seniority rights . . . simply because their employer had engaged in discrimination prior to the passage of the Act," *id.* at 353. The question of the application of § 703(h) to seniority systems initiated after 1965 was not present in *Teamsters* and apparently has not been authoritatively addressed subsequently. Considering that Title VII is a broad remedial statute, we believe the legislative history supports the view that only those bona fide seniority systems in operation when Title VII took effect are entitled to the protection of § 703(h). Systems initiated in the post-Act period must of course pass muster under the *Griggs* analysis in the same manner as other facially neutral policies or practices challenged as discriminatory in their consequences. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Because § 703(h) has no application to this policy, its discriminatory effect was properly assessed by the district court under the general disparate impact test laid down in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The violation then found under that test and the related relief given having been affirmed by this court, 535 F.2d at 264-66, defendants are entitled to no relief from those portions of the judgment related to American's job lines of progression policy.

B.

There is no question that if American's branch seniority system is bona fide within contemplation of § 703(h) as interpreted in *Teamsters*, defendants are entitled to relief from those portions of the judgment related to inter-branch transfers. This system, unlike the lines of progression policy, was in effect when Title VII went into effect, and seniority rights were then vested under it. Opening up inter-branch transfers to protected groups of employees without loss of their branch seniority indubitably impinges retroactively upon seniority rights already vested at the critical time in employees in the transferec branch. It is this that is forbidden by § 703(h), so long as the seniority system is "bona fide." 431 U.S. at 348-55.

We turn now to the fact that the district court in ruling on the 60(b) motion expressly concluded that in light of *Teamsters*, American's seniority system was not bona fide. Implicit in that conclusion, earlier quoted, was the district court's understanding that, under *Teamsters*, American's branch seniority system would not be bona fide if it either "had its genesis" or was thereafter "maintained" for an illegally discriminatory purpose. We agree that this is *Teamsters* teaching. *Id.* at 356. However, we do not think that the record before the district court when it ruled upon

the motion justified its specific conclusion that the system was not bona fide under this test. Certainly there are not in the record before us express findings of fact that would support such a conclusion. Whether there is evidence sufficient to support the requisite findings of fact is doubtful in view of the understanding of § 703(h)'s application that reigned in this Circuit when the original record was being made. In consequence, the present record does not permit us to conduct a principled review of the district court's ruling on this point. *See Schneiderman v. United States*, 320 U.S. 118, 129-30 (1943); *Kelley v. Everglades Drainage District*, 319 U.S. 415, 421-22 (1943); *Knapp v. Imperial Oil & Gas Products Co.*, 130 F.2d 1, 3-4 (4th Cir. 1942).

Because the issue of the branch seniority system's bona fides only emerged in its present contours after the original record was made, we conclude that the relief invoked by defendants under 60(b) can only be achieved by reopening the record for additional proof and a new determination of bona fides in light of *Teamsters*.[8]

III
Evans

Evans held that Title VII was not violated by an employer's failure to grant retroactive seniority under its bona fide seniority system to a rehired employee who had not filed timely charges with EEOC following her earlier discriminatory discharge. Defendants here contend that *Evans* draws in question the continued validity of the district court's judgment to the extent it finds violations of Title VII and grants relief related to defendants implementation of its 1968 promotional system, because no timely challenge to

[8] For guidance in addressing the issue the district court may find helpful the Fifth Circuit's decision in *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 350-53 (5th Cir. 1977).

that system was filed with EEOC when the system was adopted. We conclude that *Evans* is inapposite to the facts of this case and hence requires no modification or reconsideration of the judgment.

In *Evans* the Court specifically rejected the employee's claim that the failure to accord her retroactive seniority benefits constituted a "continuing violation" that was not time-barred. Rejection was on the basis that the seniority system itself was not charged or proven to constitute an *existing* violation of the claimants' rights to nondiscriminatory conditions of employment. In the instant case, by contrast, the violations charged and found by the district court were "continuing" in the very sense not present in *Evans*. Here the promotional policies adopted in 1968 were alleged by the claimants, found by the district court, and affirmed by this court to involve a continuing pattern or practice of discrimination that locked black and women employees into less favorable job positions. These effects, unlike the denial to the *Evans* claimant of retroactive seniority benefits, constitute truly "continuing" violations of Title VII. Hence, claims related to these violations are not barred by failure to have challenged at its inception the policy which gave continuing rise to them.

IV

Hazelwood

Defendants contend that *Hazelwood* undercuts the basis upon which discrimination was found in appointments to supervisory positions at the Richmond and Virginia branches, and that they are accordingly entitled to relief from related portions of the judgment. While we do not believe that *Hazelwood* requires full relief from the judgment on the present record, we conclude that it does require remand for reconsideration.

Hazelwood made two critical clarifications in Title VII doctrine that might significantly have affected the district court's original assessment of the evidence, its resulting judgment, and this court's initial review of that judgment. The first has to do with the relevant time period within which discrimination is to be assessed; the second, with the assessment of statistical proof in respect of jobs claimed by the employer to require special qualifications or skills. For reasons that follow, we conclude that the judgment under attack is not supportable on the present record under a fair application of these principles from *Hazelwood*, and that their proper application can only be insured by reconsideration of the evidence related to the supervisory positions on a reopened record in the district court.[7]

The district court's original finding of discrimination in appointments to the supervisory positions was based entirely upon plaintiff's statistical proof. This showed substantial current disparities between the percentages of blacks and women in the general population of the Richmond SMSA[8] and those employed in supervisory positions by American in its Richmond and Virginia branches[9] and, again, between the percentages of black and women employees in lower level positions at American and those employed in supervisory positions by American in its two branches. Taking into account that the supervisory positions had been filled partially by hiring from outside and partially by promotion and transfers from within American's work force, the district court concluded that a violation of Title VII in filling

[7] See note 1 *supra*.

[8] There is no dispute that the appropriate geographical area from which to draw base statistical data is that defined by the Richmond SMSA.

[9] This excludes any consideration of the special case of the Richmond office which, with only four or five post-Act vacancies involved, is not in issue on this appeal.

these positions had been established by plaintiff's statistical proof. The district court considered but was unpersuaded by defendants' statistical evidence offered to rebut plaintiff's prima facie case. That evidence consisted of two elements favoring defendants' position that were then and now contended to be more probative on the issue than plaintiff's statistical evidence: statistical data showing the percentages of women and blacks categorized as "supervisors" in the SMSA figures compared with the percentages of blacks and women employed in supervisory positions at American; and statistical data showing the overall course of American's appointments to vacant supervisory positions since the effective date of the Act.

While the record is not wholly clear on the point, we are persuaded that the district court gave little, if any, consideration to these elements of defendants' proof, presumably for the very reason that *Hazelwood* had not then made plain their great importance in assessing proof of discrimination in this type case. Our reasons for this conclusion require brief analysis of *Hazelwood*'s specific teaching on the relevant issues and of the district court's order denying the Rule 60(b) motion.

As we recently pointed out in *EEOC v. Radiator Specialty Co.*, ____ F.2d ____ (4th Cir. Nov. 15, 1979) (slip op. at 17), *Hazelwood* and its recent progeny have now confirmed the inappropriateness in the usual case of using general population and general work force statistics as base data for establishing discrimination in respect of hiring and promoting to job positions requiring special qualifications "not commonly possessed or readily acquired." In the instant case, it seems obvious that in the pre-*Hazelwood* setting both the district court in entering original judgment and this court in review simply assumed the appropriateness of using plaintiffs' general population and general work force statistics as

the base data for comparison with American's employment of blacks and women in supervisory positions. On the district court's part this may have been because it rejected American's contention that special qualifications existed. If so, the record does not indicate that this was the basis for the court's reliance upon plaintiffs' statistics, nor would such a conclusion have been supported on that record. The question whether special qualifications in the *Hazelwood* sense did or did not exist for these positions could not be resolved as a matter of law on the basis of the opposing parties' bald conflicting assertions, nor by looking simply to the manifest nature of the positions, but required a factual inquiry whose necessity was not then realized. *See EEOC v. Radiator Specialty Co.*, ____ F.2d at ____ (slip op. at 14-16). That factual inquiry is required now to assure compliance with *Hazelwood*'s teaching on the appropriate use of statistical evidence to establish and to rebut a prima facie case of discrimination.

It is equally obvious that the district court and this court in the pre-*Hazelwood* setting failed to assess the evidence with appropriate regard for the relevant time period for inquiry as that too has now been clarified in *Hazelwood*. Basically, *Hazelwood* teaches on this point that the relevant period commences no earlier than the effective date of the Act.[10] This has two critical consequences. It makes irrelevant to the establishment of a prima facie case any evidence, including statistical data, related to pre-Act employment acts.[11] Perhaps more critically, it permits an employer effectively to rebut a prima facie statistical showing of discrimi-

[10] Under *Evans*, of course, the beginning of the relevant time period may be at later times set by limitation periods for charging violations.

[11] Except for the limited purpose of proving inferentially the continuation of pre-Act discrimination into the post-Act time period. *See Hazelwood*, 433 U.S. at 309 n.15.

nation in a current, static employment situation by showing that within the critical post-Act time frame its employment acts have been non-discriminatory. Thus, an "employer who from [the effective date of the Act] forward made all its employment decisions in a wholly non-discriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes." 433 U.S. at 309.

In considering on the 60(b) motion whether *Hazelwood* required relief from the judgment, the district court took the view that its only possible relevance was "on the question of whether the defendant should have been allowed to put on evidence to rebut the plaintiffs' prima facie case." As to this, the court pointed out, the defendants had been "allowed and they did, put on a substantial amount of evidence in an unsuccessful attempt to rebut the prima facie case." Therefore, the court concluded, "*Hazelwood* . . . is inapplicable to these cases." Jt. Supp. App. at 23. As our discussion has indicated, *Hazelwood* goes well beyond simply authorizing the presentation of rebutting proof by an employer, and touches in critical ways upon the appropriate mode of assessing the total proof adduced by both sides. Our review of the record, including of course the district court's expressed perception of *Hazelwood*'s impact, persuades us that reconsideration of the evidence on a reopened record is required in order fairly to determine whether the judgment can stand in light of *Hazelwood*.[12]

[12] The possibly decisive force of defendants' proof of post-Act appointments if properly considered under *Hazelwood*'s teaching is exhaustively explored in Judge Widener's opinion dissenting from the withdrawn panel opinion in this appeal. 586 F.2d at 306-10. Without attempting prejudgment of the matter, we draw attention here to that analysis merely to emphasize our conviction that *Hazelwood*'s impact may not have been fully appreciated by the district court in ruling on the Rule 60(b) motion.

As earlier indicated, it is clear in the first place that the question of special qualifications for the supervisory positions must be determined as a prelude to proper assessment of the statistical evidence. If it is determined that no special qualifications beyond those commonly possessed or readily acquired are involved, then general population and work force statistics within the relevant time period may appropriately be used to determine whether plaintiffs' evidence of record establishes a prima facie case.[13] If it is determined that special qualifications in this sense do exist, then the most probative evidence will be qualified market data,[14] and

[13] This will require a rough break-out of appointments by hiring from those by promotions (or transfers) from within American's work force. The relevant labor pool for assessing discrimination in promotion practices consists of qualified lower level employees. *E.g., Hill v. Western Electric Co.*, 596 F.2d 99 (4th Cir. 1979).

[14] While we have earlier noted the possibly decisive force of SMSA statistics as the appropriate qualified market data, see note 12 *supra*, the question of their actual appropriateness will itself require analysis by the district court. Defendants contend that we have already decided their appropriateness by stating in our original panel decision that they provided a "more realistic measure of the company's conduct than the gross percentage of blacks and women in the whole work force." 535 F.2d at 275. This was said, however, in the context of an evaluation of the propriety of the district court's remedial order. The question of their appropriateness for determining liability in the first instance is an open one on the present record. The SMSA statistics give the percentages of blacks and women in the Richmond area who are employed in jobs denominated as "supervisory" in the total labor pool there analyzed. Whether these percentages substantially reflect the percentages of persons in that pool "specially qualified" for American's particular supervisory positions is not manifest on the present record.

Until the actual nature of any special qualifications required for American's positions is determined in some factual detail, the probative force of the SMSA data will not be apparent. In any event, plaintiff is not absolutely required to produce evidence of the actual percentages of specially qualified blacks and women in the relevant labor pool in order to make out a prima facie case. Other data, *e.g.*, applicant-flow statistics, may be "very relevant," *Hazelwood*, 433 U.S. at 308 n.13, though this has to be carefully assessed in light of the particular situation in issue. *See Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977).

general population and work force data may be found not appropriate as the basis for statistical comparison.[18] In the latter event, plaintiffs should be allowed on the reopened record to adduce any evidence of qualified market data available to them. *See EEOC v. Radiator Specialty Co.*, ____ F.2d at ____, ____ (slip op. at 15-18).

Next, in assessing defendants' rebutting evidence, whether on the present or a reopened record, proper weight must be accorded its tendency to show nondiscrimination in post-Act employment decisions, notwithstanding the inference of discrimination permissible under *Griggs* from plaintiffs' statistical proof of a prima facie case. In order fairly to assess defendant's effort at rebuttal, it would seem necessary to establish on a reopened record the details of the relatively small number of post-Act appointments (apparently around 30 in number) to supervisory positions: the approximate dates when vacancies were filled, the race and sex of each appointee, and whether appointment was by promotion from within or hiring from without. Only so can a valid statistical comparison within the relevant labor pool be made.

V

For these reasons, the order of the district court denying on their merits the motions of American and the Union for

[18] *Hazelwood* did not entirely rule out the use of general population and general work force statistics in "special qualification" cases, simply pointing out that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population . . . *may* have little probative value." 433 U.S. at 308 n.13 [emphasis supplied]. The question remains whether under the circumstances of a particular case the statistical proof offered justifies the inference on which the prima facie case rests. Our own post-*Hazelwood* cases have made it plain, however, that where special qualifications are found to exist, general population and work force statistics will not normally suffice as the base data for establishing a prima facie case. *See EEOC v. Radiator Specialty Co.*, ____ F.2d ____ (4th Cir. Nov. 15, 1979); *Hill v. Western Electric Co.*, 596 F.2d 99 (4th Cir. 1979); *EEOC v. Chesapeake & Ohio Railway*, 577 F.2d 229 (4th Cir. 1978).

relief under Fed. R. Civ. P. 60(b) is affirmed in part and vacated and remanded in part for further proceedings consistent with this opinion.

Affirmed in part;
Vacated and Remanded
in part.

WINTER, Circuit Judge, concurring and dissenting:

I concur in the majority opinion of the in banc court with respect to its treatment of the *Teamsters* and *Evans* issues both for the reasons set forth therein and the reasons expressed in the majority panel opinion, Patterson v. American Tobacco Company, 586 F.2d 300 (4 Cir. 1978) (Patterson II). I dissent from the majority's application of the *Hazelwood* principles to the instant case and from the remand for further proceedings under *Hazelwood* both for the reasons expressed in the majority panel opinion and those that follow. In my view the present record conclusively shows that the requirements of *Hazelwood* have been amply met. American has had at least one opportunity to demonstrate otherwise. It did not avail itself of that opportunity and the court should proceed to final disposition without further delay.

I

I agree that under *Hazelwood* an employer may successfully rebut a plaintiff's prima facie case, which plaintiff established by proving that the percentages of women and blacks employed as supervisors is disproportionately low to the percentages of women and blacks in the available labor pool, by showing that the percentages of women and blacks categorized as "supervisors" in the SMSA figures compared favorably with the percentages of blacks and women employed in supervisory positions by the employer. But, as I understand the law, resort to the "supervisors" statistics in the SMSA figures is predicated upon a showing by the employer that the supervisory positions require special qualifications *"not commonly possessed or readily acquired"* by the general labor force. EEOC v. Radiator Specialty Co. ____ F.2d ____, ____ (4 Cir. 1979) (emphasis added). If such a showing is not made, the appropriate statistics to be con-

sidered are those of the available labor force. I also agree that *Hazelwood* teaches that the relevant period for determining discrimination in hiring or promotion is not earlier than the effective date of the Title VII (July 2, 1964). [*sic*]

On the question of the statistics to which the court should turn to decide if plaintiffs' prima facie case was rebutted, I think that the stipulation of the parties, made June 24, 1974, supplies the answer. The parties stipulated:

> 56. Prior to selecting an employee for promotion to a supervisory position the defendant Company gives the local union an opportunity to make recommendations.
>
> 57. The defendant Company has never had an educational requirement for employees promoted from hourly production jobs to supervisory positions.
>
> 58. Hourly employees of the defendant Company do not have to apply or express their interest in holding a supervisory position in order to be considered for promotion to such a position.
>
> 59. The defendant Company does not have any written guidelines which are used in selecting supervisory personnel.
>
> 60. The selection of supervisors at the Richmond and Virginia Branches of the defendant Company is left to the discretion of those employees at the superintendent and manager levels of plant management.

I would think it obvious that if American permits a union to nominate candidates for promotion, if it imposes no education requirement for employees promoted from hourly production jobs to supervisory positions, if it does not require a showing of employee interest as a condition of promotion and if it has no written guidelines for selecting supervisory personnel, relying instead on the unbridled discretion of higher supervisory personnel, there is no requirement that

employees hired for supervisory positions possess skills or special qualifications not commonly possessed or readily acquired. Even if, as the majority speculates, the district court simply assumed the appropriateness of using general population and general work force statistics as the base data for comparison with American's employment of blacks and women in supervisory positions, that assumption was manifestly correct. Irrespective of whether the district court in its original decision or in its decision on remand articulated the reason for its result with the legal nicety that the majority would prefer, I see no point in returning the case.

It should be remembered also that, while the district court was reconsidering its decision on remand, *Hazelwood* had been decided. Our direction to the district court gave American full opportunity to tender proof of the special qualifications which it believed that it was necessary that its supervisory personnel possess.[1] American failed to offer any evidence other than that already contained in the record. Instead it stated to the district court both in writing and in the oral statements of counsel that the present record was sufficient and the issue to be decided was purely legal. Moreover, before us, American relies on SMSA statistics which have little relevance to the tobacco industry; namely, statistics derived from construction craftsmen, mechanics and repairmen, machinists, metal craftsmen, and other craftsmen. Thus from lack of proof of the need for special qualifications, despite an opportunity to offer such proof, and general inappropriateness of the statistical data asserted to

[1] The actual sequence of what transpired was that after we decided Patterson II defendants moved us to recall the mandate and to reconsider our decision in the light of, *inter alia*, *Hazelwood*. In denying the motion, we stated in our order that "[t]he parties may present to the district court all questions of law arising out of recent Supreme Court cases . . . and they may offer such supplementary evidence as may be pertinent . . ."

support American's position, I would conclude that the only relevant evidence on the factor in question is the stipulation of the parties which, as I have shown, established that special qualifications are not required. Since there was no necessity of special qualifications, the correctness of the district court's factual determinations is unimpeached and there is no need for a second remand.

II

I also see no need to remand for a consideration of post-Act employment decisions for, as I view the record, under any test plaintiffs' prima facie case was not rebutted.

During the post-Act period to the date of trial, American hired or promoted approximately 85 persons to supervisory positions at the Virginia and Richmond branches, 55 at Virginia and 30 at Richmond.[a] Of this number, 34% (27) were promoted and the rest were hired from the outside. At the Virginia branch, 6 of the 55 supervisory appointments were of blacks—10.8% of the total supervisory appointments. At the Richmond branch, 3 out of 30 supervisory appointments were of blacks—10% of the total supervisory appointments. Both of these figures are below the percentage of blacks in even the Richmond SMSA supervisory workforce (12%), and more markedly so with respect to the proportion of blacks in the overall workforce (23.6%).[b]

[a] The majority in banc opinion refers to the number as being approximately 30 in number. Presumably this statement is based upon the district court's finding that "at least" 18 and 9 persons were hired or promoted to supervisory positions at the Virginia and Richmond branches, respectively. But the district court in later findings found that from January 1, 1963 to June 1, 1973 there have been over 55 and 30 vacancies in the assistant foreman position at the Virginia and Richmond branches, respectively, and since 1966, 4 vacancies in the position of supervisor in the Richmond office.

[b] For the reasons set forth in Part I of this opinion, I would deem as the appropriate measure the proportion of blacks in the overall work force (23.6%).

Thus, to me, the evidence of post-Act hirings and promotions to supervisory positions confirms and does not rebut the plaintiff's prima facie case of racial discrimination in post-Act recruitment of supervisory personnel.

There is further support for this conclusion in an analysis of the appointment dates of the black supervisors. Of the 9 black supervisors at the Richmond and Virginia branches at the date of trial, 5 were not made supervisors until *after* January 3, 1969, when EEOC charges were filed. Since one black supervisor had been appointed prior the effective date of Title VII, this means that American voluntarily appointed only 3 black supervisors during the period that its compliance with the law is to be measured.

III

In the light of my views, it could be asked why I do not join in the majority in banc opinion since I agree that remand under *Teamsters* is required and the record is such that plaintiffs will prevail on both issues on remand under *Hazelwood*. The short answer is that this litigation has proceeded at a regrettably slow pace to date. The ultimate relief to those of the plaintiffs entitled to back wages has long been denied. Conversely American has been afforded a full and fair opportunity to show how *Hazelwood* should change the course of this litigation and it has failed or been unable to meet the burden resting on it. I do not think that the ultimate decision in this case on any issue should be delayed any longer than is absolutely necessary. Since I see no viable issue under *Hazelwood*, I would not complicate the remand by interjecting this issue.

Judge Butzner authorizes me to state that he joins in this opinion.

WIDENER, Circuit Judge, concurring and dissenting:

I

I concur in the result reached by the majority in part II-B of its opinion, as well as in part IV thereof.

II

As to part III of the majority opinion concerning the application of *Evans*, I respectfully dissent for the reasons I have stated in my dissenting opinion at 586 F2d page 310.

III

I respectfully dissent to part II-A of the majority opinion for the reasons I will set out below.[1]

The lynchpin of the majority's holding, that § 703(h) has no application, is this statement found on page 10 of the slip opinion:

> "This policy [lines of progression] was not in effect at American in 1965 when Title VII went into effect, but was only adopted in January 1968 in connection with American's general revision of its promotional policies, 555 F.2d at 263."

[1] I would not find it either necessary or appropriate to make the majority's holding that § 703(h) only applies to seniority systems in existence on the effective date of the Act, although I note that the statutory language and legislative history do not require this holding. The Supreme Court has specifically noted in *Teamsters* that § 703(h) on its face immunizes all bona fide seniority systems. 431 U.S. 348, n. 30. Although § 703(h) is written as an exception and not as a grandfather clause, the majority simply transforms an ordinary exception into just that. Congress undoubtedly knows how to write a grandfather clause if it wishes, but in this case wrote an exception instead. New plants, for instance, are summarily excluded from § 703(h) in the majority view, without stated justification.

I have read page 263 of that opinion from beginning to end, and, with respect, cannot read into it the meaning given by the majority which I have just quoted. Indeed, that opinion indicates, if anything, the lines of progression were in existence at least as early as 1963. 535 F2d at 271. I think the source of the majority's statement is more likely an uncritical acceptance and erroneous interpretation of stipulation 38 filed in the district court, to which I will later allude. In all events, without the accuracy of the quoted statement, the opinion of the majority, that § 703(h) has no application, is without foundation. I think the record is uncontradicted and compelling that the factual statement is demonstrably wrong.

In this case, the pretrial discovery, the trial, and the district court's decision all occurred prior to the Supreme Court's decision in *Teamsters*. Therefore, it was not material whether or not the lines of progression existed prior to 1965 (the effective date of the Act). It is thus not surprising that the district court's findings of fact do not address this issue directly and can be read in two ways.[2] The majority today

[2] The district court's stipulation 38 states that a posting and bidding system was instituted in 1968, and that there were exceptions for nine named lines of progression. It does not state whether the lines already existed in 1968 or whether the lines were created in 1968. In light of the full record, the former interpretation is clearly correct. The stipulation reads in full:

> 38. On January 15, 1968, the defendant Company instituted a system (which is still in effect) whereby permanent vacancies in classifications under the jurisdiction of Local 182 of the T.W.I.U. at both the Richmond and Virginia Branches were filled through job posting and employee bidding. Under this system, all such vacancies are posted on plant bulletin boards for seven working days. Anyone in the bargaining unit may sign any posting (bid on any job) with the exception of postings for vacancies in the adjuster, learner adjuster, examiner-making, examiner-packing, and dryer operator, textile dryer operator, overhaul adjuster-making or packing, and turbine operators classifications at the Virginia Branch and adjuster and learner adjuster at the Richmond Branch.

simply assumes the lines of progression were created in 1968. Not only is this assumption not correct, but the full record clearly demonstrates that in 1968 lines of progression were *eliminated*, except for the nine lines at issue here which already existed and which were merely acknowledged as pre-existing exceptions to the posting and bidding system. On remand, the district court should if necessary take additional evidence, and in all events issue findings of fact on the origins of the lines of progression.

The full record, even as it now stands, is replete with evidence that the lines of progression existed for many years prior to the effective date of the Act.[2] The Company did not, and still does not, use the terminology "lines of progression." The Company does use the term "qualifications" to describe what are in fact lines of progression; that is, one became "qualified" for a job at the top of the line by first holding a job nearer the bottom of the line. The district court found as a fact that both prior to and after the effective date of the Act, job qualifications "referred to whether or not an employee had filled a particular job before and was in the opinion of supervisory personnel, familiar with it." Finding of Fact Number 8. (Appendix II 8 EPD, ¶ 9722, p. 6012, E.D. Va. 1974.)

Of plaintiffs' First Interrogatories to Defendant American Tobacco Company, interrogatory number 7 calls for an explanation of "the basis or rationale for each line of progression . . . and each change therein described in answer to interrogatory 6. . . ." (Record, v. I, p. 47, 50-51.) The answer refers to a list of jobs "with qualifications other than

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What this opinion refers to as stipulation 38 is actually paragraph 38 of stipulation 1. Other numbered stipulations referred to are the numbered paragraphs of stipulation 1.

[2] A search of the 52 volume record reveals no evidence to the contrary.

seniority." The answer goes on to explain:

> This means simply that an individual has to bid for, and qualify on, the lower paid job first in each case before that person may bid for, and qualify on, the higher paid job. The criterion for requiring these "qualifications" is based squarely on the necessity of learning the first job before being able to adequately perform the next one even after the regular training period.
> (Record, v. I, p. 287.)

The list of jobs referred to (which became Plaintiffs' Exhibit 35M) is titled "EXPLANATIONS OF CLASSIFICATIONS WITH QUALIFICATIONS OTHER THAN SENIORITY IN ANSWER TO QUESTION 7." The list then describes each line of progression (Learner Adjuster to Adjuster, Operator to Learner Adjuster, Catcher to Examiner-Making, etc.) and gives a detailed explanation of the rationale for each one. It is beyond question that the Company used "qualifications" as a synonym for lines of progression.

Interrogatory 6, referred to in interrogatory 7 (see *supra*), reads in relevant part:

> 6. Describe in detail all changes in the composition or structure of departments and lines of progression, or in any job, including the creation, elimination, merger, or restructuring of any department, line of progression or job which occurred between January 1, 1960 and the date these interrogatories are answered.
> (Record, v. I, p. 50.)

American's answer was dated July 26, 1973:

> 6. The significant changes in departments patterns of movement (sic), etc., which have taken place since January 1, 1960, are as follows:

* * *

(b) *The elimination of qualifications* (except as noted in answer to question 5) with the establishment of seniority as the sole criterion for permanent promotion to be effected through the posting and bidding system in the contract of 1968 as agreed between the company and the Union.

(c) . . . By 1968 the Company and the Union negotiated *the elimination of qualifications* except in the few jobs mentioned in answer to Question 5.

(Record, v. I, p. 269-270)[4] (italics added).

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[4] Similar interrogatories were put to the defendant unions. The local and the international provided separate answers, all of which are not illuminating. Plaintiffs' First Interrogatories to Defendant Unions, (Record, v. I, p. 30), includes interrogatory 23 (*Id.* p. 37):

> 23. State whether American Tobacco and defendant have entered into any agreements which in any way altered, restructured, rearranged or merged the lines of progression in any of the departments or units utilized by the Company for organizing its employees by jobs performed. If so, . . . [state] the dates of the agreements.

Defendant Local No. 182's Answers to Plaintiffs' First Interrogatories (Record, v. I, p. 95, 98) states:

> 23. See attached copies of contracts. Chief negotiators for both sides shown in back of attached contracts. Dates of agreements also shown. Dates of negotiations not known.

The Defendant Tobacco Workers International Union's answer simply states that "International has not entered into any agreement with The American Tobacco Company." (Record, v. I, p. 100, 107). *Every union contract in the record, covering the period from 1960 through 1974, states that promotions are based on seniority and qualifications. None of the contracts mention "lines of progression."* See Plaintiffs Exhibit 35FF and page 9 infra.

Plaintiffs' First Interrogatories to Defendant American Tobacco Company, interrogatory 5 (Record v. I, p. 47, 49), is: "State whether jobs in the plant are organized or grouped in any way into departments and/or lines of progression." The Company's answer, in relevant part, is: "There are a few jobs with qualifications other than seniority under the 'posting and bidding' system and these are listed in the attached 1968 agreement between Management and the three Eastern Locals (182, 183, and 192 of the TWIU)." (Record v. I, p. 285). Notwithstanding what the answer claims, the 1968 agreement does not mention lines of progression or the particular jobs involved, and neither does any of the other union contracts.

Since the answer describes the reduction in the number of lines of progression which occurred in 1968 but does not indicate the creation of any lines, the lines existed on and before January 1, 1960. The lines of progression were not created in 1968, as the majority assumes; they were eliminated in 1968, with the exception of the few at issue here. These few existed well before the effective date of the Act, and were not eliminated in 1968 when the rest were.

The Company provided two sets of answers to each interrogatory, one for the Richmond Branch and one for the Virginia Branch. The answer to interrogatory 6 quoted above is for the Richmond Branch. The answer for the Virginia Branch contains a paragraph identical to paragraph (b) quoted above, and also adds:

> By *1967*, the pattern of downward movement, principally of whites, had slowed somewhat, a few new hires were taken in, some whites elected voluntary layoff status rather than do some of the pipeline jobs, and *the Company and the Union negotiated the elimination of qualifications* except in those few jobs mentioned in answer to question 5.
> (Record, v. I, p. 287) (italics added).

The Answer to interrogatory 7 quoted above is for the Virginia Branch. The Richmond Branch answer reads: "7. Refer to Virginia Branch answers, same information is applicable. (Note only classifications of Adjusters and Learner Adjusters apply to Richmond Branch.)" (Record v. I, p. 270).[5] Lines of Progression were in existence prior

[5] The EEOC put similar interrogatories to the Company, and received similar answers. See EEOC Interrogatories 1-20 to Defendant American Brands, Inc., d/b/a The American Tobacco Company, interrogatories 8 and 16 (Record, v. I, p. 195, 201, 203-204) and the Company's answers (Record, v. I, p. 315, 318, 321-324 (Richmond Branch), and p. 327, 332, 336-338 (Virginia Branch)).

to 1960, and all but the nine[6] at issue here were eliminated by 1968.[7]

It is more than merely interesting to recognize that the named plaintiff, John Patterson, filed his charge not because he would not enter a line of progression as may be inferred from the various majority opinions filed in this case but because the line of progression that he was in was *eliminated* in 1968. Although a description of his line of progression, like the others, was not formally reduced to writing, Patterson and everyone else knew about it, relied on it, and Patterson was understandably upset when it was eliminated. Patterson had been a factory supply handler, and there had been a line of progression from that position to the position of machine operator. Supply handlers were trained to be operators, and part of their job as supply handler was to relieve the operator. In this manner handlers gained one or two hours of experience a day as operators. (Record, v. XVII, pp. 68-73, 105-106, 118; v. XXV, p. 56; v. XVIII, p. 57D; v. XIX, p. 4-5 (deposition of foreman Barnes); v. XXXVIII, p. 18 (deposition of employee Howard); v. XXXIV, pp. 43-44, 53-59-60 (deposition of Foreman Thomas); v. V, pp. 135-136 (Trial Transcript); v. VII, pp. 627-631 (Trial Transcript)). Patterson gave the following testimony at his deposition:

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[6] Since the district court found that three of the lines were justified by business necessity (see Finding # 31, EPD p. 6013), only six lines are actually at issue. However, because all nine lines pre-date the Act, they are all, if bona fide, protected by § 703(h), whether or not they are justified by business necessity.

[7] American's answers to plaintiffs' first set of interrogatories contain numerous other references to the existence of "qualifications" *prior to 1968* and to the elimination or reduction in the number of lines of progression in 1968. See, e.g., answers to interrogatories 20, 25, 26, 28, 29 (Record, v. I, pp. 294, 296, 298, 299, 300).

Q. Did you file a charge of discrimination with the EEOC?
A. Yes.
Q. I believe it was in 1968. Can you recall the specific charge that you made at that time?
A. Yes.
Q. What was that?
A. Well, the charge was that they had—you want me to go into detail on it?
Q. Be fine.
A. Well, I had put in my time for my hours of receiving a machine, which was supposed to be nine hundred hours, and in the meantime after we put in that nine hundred hours they gave out some machines, but they dipped back across from the agreement they made. They changed the agreement.
Q. Was this in 1968?
A. In '68.

* * *

Q. Do you recall the employees who got those promotions following the posting?
A. No, I don't recall that either.
Q. If I told you they were James Starkes, Isaiah Jones, Milton Branch and Andrew Yancey, would that refresh your memory?
A. Well, that seems like the four that were brought over after we had served our nine hundred hours. I say that seemed like the four.
Q. And they were all senior employees to you, were they not?
A. Yes, they were senior.
Q. And they were all black employees, were they not?
A. Yes.

* * *

Q. Now, as I understand it, the only claim of discrimination that you made so far as your testimony in response to Mr. Wickham's question is that you had accumulated 900 hours on the machine, is that correct?

A. Right.
Q. And that you didn't get a job as a machine operator, is that right?
A. Right.
Q. There was no other claim of discrimination that you are making?
A. Not for me.

* * *

Q. Who discriminated against you?
A. From what I understand, they changed the rule in the middle of the stream and I got hurt.

* * *

Q. How did they change the rule?
A. Well, from the way I look at it, they changed the rule when they reached over and got those four men and put them into jobs like that and left the other men that had accumulated the hours with the less seniority outside.
Q. Those four men were black men, weren't they?
A. Yes.
Q. This is what you mean when you say you were discriminated against?
A. Yes.
(Record, v. XXV, pp. 20-21, 23, 36, 27.)

Mr. Dillard (manager), in his trial testimony, confirmed that this was the basis of Patterson's charge. (Record, v. VIII, pp. 982-982, 1035.) The *elimination* of this line of progression in 1968 (from factory supply handler to machine operator) formed the basis of Patterson's charge. Patterson was in a line of progression, but when this line was eliminated and replaced with a posting and bidding system, others with more seniority got the vacancies.

Taylor, another named plaintiff, also filed a charge with the EEOC, alleging that his seniority rights were violated. His complaint is identical to Patterson's. He had acquired 900 hours' experience as an operator, but when that line

of progression was eliminated in 1968, four other blacks with more seniority got the position(s) he wanted. (Record v. XXV, pp. 72-82 (Taylor's deposition); v. XXXVIII, pp. 7-11, 18 (deposition of Howard, a black Union officer who has been with American since 1946): v. VIII, pp. 982-984, 1035 (Dillard's trial testimony)).

Every contract between American and the relevant locals of the Tobacco Workers' International Union clearly recognized that for some promotions, "qualifications" were necessary. Article 8 of the Union contract, for example, signed on November 4, 1959 (effective January 1, 1960) contains the following:

> All promotions and demotions shall be made in accordance with seniority *provided that*, in the opinion of the Management, *there is no question as to the qualifications* and efficiency of the employee concerned. (Italics added)

Identical or very similar clauses were included in every contract since then (no earlier contracts appear to be in the record). (See Record, v. XIV, Plaintiffs' Exhibit 35FF, Union Contracts effective January 1, 1962 (including amendment of Oct. 27, 1964); January 1, 1965; January 15, 1968; January 15, 1971.) These contracts, interpreted in light of the district court's finding on the meaning of "qualifications," show that at least since 1960, a promotion to certain jobs depended on whether or not the candidate "had filled a particular job before." This describes the essence of a job line of progression. Indeed, we so described it in the first panel opinion in nearly the same words. 535 F2d at 265. The 1968 and 1971 union contracts continued to use the terminology "qualifications." They did not use the phrase "lines of progression," nor did they identify which jobs are in lines of progression.

Plaintiffs' Exhibit #56 indicates which jobs, at the Virginia Branch, required "qualifications" in 1963 if not earlier. The exhibit lists 82 job classifications in which, as of September 1963, vacancies were filled by "the same system of filling vacancies (promotions) as the Richmond Branch, i. e., no qualifications, plantwide seniority only." That list of 82 jobs does not include any of the nine jobs at issue here (adjuster, learner adjuster, examiner-making, examiner-packing, ADT dryer operator, textile dryer operator, overhaul adjuster, adjuster-prefabrication, and turbine operator). The sentence immediately following that list reads:

> From September 16, 1963 to January 15, 1968 promotions to the remaining job classifications at Virginia Branch required plant-wide seniority and qualifications, with "qualifications" prevailing over seniority.

This clearly shows that at least as early as 1963, in order for an employee to get promoted to one of the nine jobs at issue here (as well as others), the employee had to have filled a particular job before. Lines of progression existed at least as early as September 16, 1963. See also Record, v. V, pp. 84-87.

The record is replete with evidence that as far back as the 1950's, for the jobs at issue here and for others, an employee had to work in the lower paying job before being promoted to the higher paying job. One of the nine lines that was recognized as an exception to the posting and bidding system is the line from catcher to examiner (Stipulations 38, 41). The deposition of S. Kirby, who started with American in 1952 as an Assistant Foreman, shows the following:

> Q. During that period of time [from 1952 to 1957], what type of qualifications did you have to have to

become an examiner?
A. You would have to be an experienced catcher.
(Record, v. XVI, p. 28-29; see also *Id.*, p. 52.)

The deposition of John Dillard, Manager (Record, v. XVII, p. 95), includes his statement that "To my knowledge, all of our examiners in the Making Department, at one time or another have been a catcher." Thus, the line of progression from catcher to examiner existed in the 1950's and was not "adopted" in 1968.

The progression from operator to learner adjuster was also excepted from the general posting and bidding system. (Stipulations 38 and 40, 8 EPD at p. 6010.) John Dillard started with American in 1940 as a factory clerk and worked his way up to become Manager in 1961 (which position he still held in 1973, the date of his deposition). (Record, v. XVII, pp. 4-6.) Dillard's deposition contains the following:

Q. To your knowledge, have there *ever* been any learner adjusters who haven't been operators?
A. To my knowledge, all of our learner adjusters have come from the operating classification.
(Record, v. XVII, p. 94, emphasis added.)

E. B. Barnes started with American Tobacco in 1943 as a hopper filler and tote boy, and worked his way up to become foreman by the time his deposition was taken. (Record, v. XX, pp. 3-5.) The following exchange took place at Barnes' deposition:

Q. In order for a guy to be an adjuster, would it be an advantage for him to be a maker or packer operator?
A. Oh, definitely, yes, definitely. It is almost a must. You put somebody on there to make an adjuster out of him, it would be like trying to take me and

make me an engineer without giving me an education.

Q. Do you know of any situations since you have been there where a making adjuster is put to work without being an operator first?

A. I don't recall any. I don't know of any. I don't know of any.

Q. Is there any rule that says you have to be one?

A. I think this is one of the things that goes on the posting notice when they post, to say the qualifications are that you are an operator. If it was making adjuster, that you were a making operator, etc.

(Record, v. XX, pp. 84-85.)

While the Virginia Branch had nine lines of progression, the Richmond Branch had lines leading to only two positions, learner adjuster and adjuster. (Stipulation 38, *supra.*) W. F. Miller, assistant manager of the Richmond Branch, testified at trial as follows:

Q. Now, under that departmental seniority, were there any other qualifications [f]or promotions during that period, other than seniority, departmental?

A. This was still prior to—

Q. Prior to 1963?

A. No, sir. The only qualifications were people that were interested and could learn the job. Other than we had one of our qualifications on the line of the progress.

Q. The line of progression?

A. The line of progression; that you had to be a packing machine operator before you became a learner adjuster.

Q. And a learner adjuster before you became an adjuster?

A. Yes.

Q. That line of progression is still in effect?

A. Yes, it is.

Q. And it has been even since prior to the merger?
A. Yes, sir.
(Record, v. VII, Trial Transcript, pp. 868-869. The merger referred to is obviously the merger of the two union locals which took place on September 16, 1963.)

H. Nuckols, Jr. was Machine Shop Foreman from 1955 to 1969. He also testified at trial:

Q. And what are the qualifications for becoming a learner adjuster?
A. The basic qualification is that he have been a operator, machine operator, a packer, or making machine operator.
Q. Why is this necessary?
A. Well, I would think it would be necessary in order that he would become somewhat familiar with the machine. *That is just one of the regulations they have had down through the times that they have always used....*
Q. Now, sir, in order to become an adjuster, is it correct to say that you must serve as a learner adjuster first?
A. Yes.
(Record, v. V, Trial Transcript, pp. 241-242; italics added.)

Nuckols further testified that to his knowledge, every adjuster and learner adjuster has served as either a packing or making machine operator (*Id.* at 244) and that this requirement was a prerequisite (*Id.* at 267).

G. A. Howard started with American in 1946 as a general laborer, and was a learner adjuster when his deposition was taken. He confirmed that prior to 1968 the "qualification[...]" for learner adjuster was to have been an operator. (Record, v. XXXVIII, p. 19.) Foreman O'Brien, in his deposition, also confirmed that prior to 1968 adjusters

were first operators. (Record, v. XIX, p. 38.)

Indeed, at least as early as 1963, the required qualification for "progressing" from operator to learner adjuster to adjuster existed and was used to fill even temporary vacancies. Referring to the period from 1963 to 1968, Dillard gave the following testimony at trial:

> Q. What about your adjusters? Were they handled in the same way as your machine operators?
> A. The adjusters *followed a progression that led to the job*. They had previously been an operator—
> Q. I am only talking about temporary vacancies now.
> A. Yes. I am telling you about temporary vacancies. They had been an operator, and then they had been a learner adjuster, and then they had been an adjuster.
> Q. And you filled the temporary vacancy in one of those jobs by getting someone who had previously done the job?
> A. We had a list of people, and the list was set up by seniority and qualifications, and we used the list.
> (Record, v. V, Trial Transcript, pp. 122-123.)

The EEOC, in its Post-Trial Brief, states that "qualifications" were used in the canvassing method of filling temporary vacancies "From 1963 to 1968." EEOC's Post-Trial Brief at 35 (Aug. 7, 1974). It is clear from the uncontradicted testimony at trial and in depositions introduced into evidence that the line of progression from operator to learner adjuster existed for many years prior to 1968, and prior to the effective date of Title VII.

The same is true of the progression from learner adjuster to adjuster. This line was also recognized as an exception to the posting and bidding procedure. (Stipulations 38, 39, 8 EPD at p. 6010.) Dillard's deposition includes the following:

Q. Have there *ever* been any adjusters who haven't been learner adjusters?

A. I don't positively know the answer to that question. In recent years I know that—and when I say recent years, I mean *in the last twenty-five years or so—all of the adjusters have come from the learner adjuster grouping.*

. . . .

(Record, v. XVII, p. 94, emphasis added.)

Employee Kirby's deposition includes:

Q. During that period of time from '57 to '62, again, how did someone become an adjuster?

A. Someone would have become a learner adjuster before he would have become an adjuster.

(Record, v. XVI, p. 42.)

Miller's trial testimony, quoted *supra*, confirms that prior to 1963 one had to be a learner adjuster before becoming an adjuster. Nuckols' trial testimony, also quoted *supra*, provides further confirmation that the line of progression from learner adjuster to adjuster existed well prior to the effective date of Title VII.

Indeed, the plaintiffs argued that the "qualification" of being a learner adjuster before becoming an adjuster has "always" existed. The Plaintiffs' Memorandum in Opposition to Defendants' Motion to Amend and Supplement Findings of Fact and Conclusions of Law (Record, v. IV, p. 211) includes the following response to the defendants' proposed Supplemental Finding #5:[8]

[8] American Tobacco's Motion to Amend and Supplemental Findings of Fact and Conclusions of Law and to Proffer Additional Evidence (Record, v. IV, p. 130) includes Proposed Supplemental Finding of Fact #5;

5. Both the Richmond and Virginia Branches established plant-wide seniority in 1963. The Richmond Branch has never used prior experience on a job as a prerequisite to a promotion to any job under the jurisdiction of TWIU Local 182. The Vir-

> 5. Supplemental Finding #5 is adequately covered in the Court's Finding #8. The Company's suggested supplement is incorrect, e.g. *the Richmond Branch has always required its TWIU "adjusters" to hold the position of "learner adjuster."* In addition the Virginia Branch maintained "lines of progression" as recently as the date of trial. (Stipulations Nos. 39-47.) (*Id.*, emphasis added.)

Here, then, even the plaintiffs allege that the learner adjuster-adjuster line of progression "has always" existed at the Richmond Branch.[9]

The posting and bidding system instituted in 1968 also recognized an exception for the progression from line searcher to examiner-packing. (Stipulations 38 and 42, 8 EPD, p. 6010.) The Dillard deposition includes:

> Q. All right, sir. It is my understanding, also, that in order to become an examiner in Packing, you should have been a line searcher, is that correct?
> A. Yes, sir, that is correct.
> * * *
> Q. Have there ever been any examiners who haven't been line —
> A. I am not really sure of this one. I know that we have not had any examiners that haven't been line [searchers] at some time in recent years.
>
> (Record, v. XVII, p. 96; by "recent years" he means within the last 25 years, *Id*, p. 94.)

The Dillard deposition also indicates that the boiler operator to turbine operator line of progression has existed

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ginia Branch used "qualifications" (prior experience) in certain classifications until January 15, 1968.
(Stipulation #38 directly contradicts the second sentence of the proposed finding.)

[9] The Court denied defendants' motion to amend and supplement. Record, v. IV, p. 267.

for at least fifteen or twenty years. (Record, v. XVII, pp. 100-101; see Stipulations 38 and 47, 8 EPD, p. 6010.)

Finally, even the EEOC claims that "qualifications" were used, not *after* 1968, but "until 1968." Plaintiff-Equal Employment Opportunity Commission's Post-Trial Brief at 33. Plaintiffs, John Patterson, et al, agree. In their separate post-trial brief, they claim that qualifications were part of "The American Tobacco Company's Promotional Systems Which Were In Effect *Prior to January 15, 1968.*" Post Trial Brief of Plaintiffs John Patterson, et al, at 62 (emphasis added). Indeed, that brief at that page indicates the system of "qualifications" was instituted "[f]ollowing the merger... on September 16, 1963...," as does the EEOC brief quoted last above. The only reasonable meaning to "following" is just following.

IV

It is acknowledged that the majority holding as to the effect of § 703(h) on the lines of progression within the seniority system is based entirely on the fact that the lines did not exist in 1965. I maintain this fact is simply not in the record.

Because the question of exactly when the lines of progression were initiated is so important in this case and was never made such an issue of in the district court or in the previous hearings in this court, I am of opinion the remand order should include a direction to inquire into the lines of progression to ascertain when and under what circumstances they came into being.

I doubt that it is fair to the plaintiffs to decide the question on the record before us now, but should we so do, the record is uncontradicted that the lines of progression came into being at the very latest just following the merger

of the two unions in 1963, almost two years before the effective date of the statute.

Should such an inquiry disclose that which the record tends to show, that the lines of progression were instituted prior to the effective date of the statute, then the district court should further inquire as to their bona fides.

V

Footnote 4 of the majority opinion, in refutation of the facts disclosed by this dissent, I find, with all respect, equally as unsupported by the record as is the body of the opinion.

There follows an analysis of the footnote, albeit somewhat out of the same order in which the footnote is written:

A.

The footnote ends with the conclusion that, "within contemplation of § 703(h), the job lines of progression policy here in question only came into existence in 1968," and, as a part of its authority for that conclusion, states that "a panel of this court has long since assumed" that fact. A principal problem with this case for some time has been the assumption of facts rather than their finding from the record. See, for example, my previous dissent at 586 F2d 305, 306 concerning the promotion of supervisory employees, which required a similar factual analysis. The majority here, I suggest, assumes the same fact it says the panel assumed. Assumption of facts, especially critical contentious facts, is not an acceptable way to reach a decision, I think. Rather, resort to the record is required.

While I acknowledge an "exhaustive search of the evidentiary record," I must confess to disappointment because there was no "exhaustive counter-analysis of the factual record." I suggest that a counter-analysis would not have

supported the critical fact on which the majority bases its opinion.

B.

The position the majority takes in its footnote 4 is in reality twofold.

First, to support its conclusion that the lines of progression were only adopted in January 1968, it concedes that there were "informal rudiments" of such before 1965. Such informal rudiments, however, according to the majority, were replaced in 1968 by "stated procedures adopted by American in 1968 to control entry into and promotions within specifically identified job 'lines' ".

This conclusion of the majority, I think, is not only unsupported by the record, it is entirely refuted by the record.

Both the January 1965 and the 1968 collective bargaining agreements in their only references to lines of progression state *in haec verba*:

> "All promotions and demotions shall be made in accordance with seniority except as otherwise agreed to by the Company and the appropriate Union local or locals, provided these promotions and demotions shall be made without regard to race, color, creed, sex, or national origin, and provided that, in the opinion of Management, there is no question as to the qualifications and efficiency of the employee concerned."

We must remember that "lines of progression" was not a part of the parlance of the employee, the employer, or the union until this claim became contentious. The parties all referred to job qualifications, as does the collective bargaining agreement. So, the "stated procedures" relied upon by the majority as coming into existence in 1968 in fact were in existence at least as early as January 1965. And not only were they in existence, they were letter for letter the same.

The above quotation from footnote 4 next provides that the job lines involved were "specifically identified." The use of "specifically identified" as used by the majority may easily have two meanings. One of the meanings is that the job lines were "specifically identified" in 1968 but had not been before. The other is that while the job lines had been "specifically identified" before, they were governed only by "stated procedures" beginning in 1968. Neither meaning is supported by the record. Neither the collective bargaining agreement of 1965 nor the collective bargaining agreement of 1968 has any job line which is "specifically identified." As I have heretofore pointed out, the number of job lines of progression was reduced in 1968. But, other than a reduction in numbers, the job lines of progression remained the same. The identity of the job lines of progression involved was known to everyone both before and after the 1968 agreement, as were the qualifications to benefit by one of those lines.

Footnote 4 goes on to say that within the specifically identified job lines of progression, "enough of change and formalization" took place in 1968 "to constitute a new policy, or at least one so radically altered from prior unstructured procedures" that it could not be considered a routine continuation of the old policy. I take issue with this fact finding also, and note it was not made by the district court but by this court.

That there was no "change" in the lines of progression policy by the collective bargaining agreements is clearly shown by the language of those agreements I have quoted above. The majority opinion then suggests that there was not only "change" but also "formalization" which had not existed before. By "formalization" the majority opinion may only suggest that that which theretofore had been informal was made formal in 1968. The short answer is that the

policy was formal both in 1965 and in 1968, as is again shown by the collective bargaining agreements. What could be more formal than a written contract between the company and the union? I suggest that nothing could. And I note that the majority does not demonstrate by jot or tittle how anything became formal in 1968 which theretofore had been informal. While it finds that there was a "new policy" commencing in 1968, it fails to tell us what the old policy was. Indeed, this would also seem to be impossible in view of the letter for letter repetition of the 1965 provision in the 1968 contract. The remarks just above also apply to the majority's finding that if the policy was not new, it was "at least one so radically altered" that it could not be considered simply a routine continuation of old policy. What the policy was before alteration is also not explained in the majority opinion, and, for the same reasons I have outlined above, I suggest it is impossible to explain because there was no difference.

The majority relies on *Teamsters*, 431 U.S. at 352, for its legal conclusion that the policy it finds as either *"new"* or "so radically altered" is not "simply a 'routine application' " of "those pre1965 procedures." It emphasizes that it construes § 703(h) as a "quite narrow exception" to Title VII's general coverage of conditions of employment, and again emphasizes that it considers the "routine application" of pre-1965 policies should be "given a stringent reading against any employer seeking the special insulation provided by § 703(h) for any seniority 'system' alleged to have been in place when Title VII was enacted." "On that basis," in the majority's words, it carries its "stringent reading against any employer seeking special insulation provided by § 703(h)" into fact finding, for the concluding sentence of the fact finding, "on that basis," is that the lines of progression only came into existence in 1968. I do not think that

Teamsters, or any construction of it, authorizes a "stringent reading" against anyone, employer, employee, or union, with respect to fact finding. I had thought courts must be neutral fact finders.

If it be said that the "stringent reading against any employer" is meant only to refer to whether or not § 703(h) should apply, the majority has carried that "stringent reading" into full force and effect by the result it obtains on account of changes in the lines of progression. The only way the majority can find liability on this record without further fact finding by the district court is by giving such a "stringent reading" against the employer and the union that it actually finds liability when all the employer and the union tried to do was to improve the existing conditions for the plaintiff class, as I will set out below, for it must be remembered that *each relevant change in the collective bargaining agreements disclosed in this record, whether pre- or post-act, has benefited the plaintiff class. None have been to its detriment.*

C.

While the above comments go largely to the majority's lack of factual support by analysis or by supporting testimony or exhibits to support its conclusion, and incidentally to its construction of *Teamsters*, perhaps the most serious error it makes in its efforts to support the key conclusion as to the 1968 establishment of lines of progression is this: It holds that if there is enough change and formalization of the lines of progression policy, "whether *in favor of* or against employee interest," to constitute a new or radically altered policy, then the new policy is not entitled to a § 703(h) exemption. (Italics added.) "Employee interest" may only be considered the interest of the plaintiffs since that is what this case is all about, and there is no litigation at hand con-

cerning the interest of other employees. Thus, the majority boldly holds that a change in a previously existing seniority system, although the change may be in favor of a class of black employees, will deprive the company and the union making the change from the benefit of a § 703(h) exemption.

Nothing I can think of could be less founded either in law or logic.

In the 1968 contract, for example, there is a provision for posting job openings either superimposed upon the system of lines of progression, or from which nine lines of progression were excepted. (1968 contract p. 4; stipulation 38.) Of course this action, especially when coupled with the elimination of certain lines of progression as took place, would only have had a favorable effect on the black employees as a class, for the cases are too numerous to bear citation, which, in their remedies for racially discriminatory employment practices, provide for posting and bidding. Thus, logic rejects this aspect of the conclusion of the majority.

The law likewise rejects this conclusion in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), in which the holding of the court was that it was not a violation of the 1964 Civil Rights Act for an employer and a union to agree to a preference for minority employees. The court said that the act is "intended as a spur or catalyst to cause employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." 443 U.S. at 204. Thus, *Weber* approved actions by employers and unions designed to alleviate previously existing discriminatory conditions of employment. That part of the majority opinion providing

that a company and a union cannot alter a seniority system so as to make more favorable the conditions of employment of minority employees is directly contrary to *Weber*, I think. It requires a too strained construction of the statute to hold that a seniority system admittedly discriminatory in effect, as in *Teamsters*, is protected by § 703(h) so long as it remains unchanged, but if it is changed in favor of the minority employees, then the employer and the union lose their § 703(h) exemption.

Not only is this conclusion contrary to logic and law, it is a blow against minority employees and contrary to the purpose of the statute. Hereafter, in this circuit at least, neither an employer nor a union may safely agree to any change in a seniority system existing before July 1, 1965 for fear that its § 703(h) exemption will be lost. Thus, a seniority system as rigid as the one approved in *Teamsters*, which protects a group of white employees, under the provisions of § 703(h), will receive the sanction of the statute and the blessings of this court, while a seniority system equally as rigid but which by the action of the employer and the union has, since July 1, 1965, ameliorated a part of the previously existing discriminatory conditions, will not. Such a conclusion, I suggest may sound astonishing, yet that is precisely what the majority holds.

I am authorized to state that Judge Russell concurs in this opinion.

FILED
AUG 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY, TOBACCO WORKERS' INTERNATIONAL UNION, AND LOCAL 182 OF TOBACCO WORKERS' INTERNATIONAL UNION,

Petitioners,

v.

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR,

Respondents.

AMERICAN BRANDS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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CHRONOLOGICAL LIST OF IMPORTANT DATES ON WHICH OPINIONS AND ORDERS WERE FILED

September 26, 1974	District Court enters post-trial opinion on liability
December 31, 1974	District Court enters opinion on relief and decree
February 23, 1976	Court of Appeals files opinion in *Patterson I*
November 1, 1976	Supreme Court files order denying petitions for writs of certiorari to review *Patterson I*
December 23, 1977	District Court enters order denying motions to reconsider and vacate prior findings of liability
October 23, 1978	Court of Appeals files opinion in *Patterson II*
November 18, 1980	Court of Appeals files opinion in *Patterson III*
January 15, 1981	Petition for writ of certiorari to review *Patterson III* filed
June 15, 1981	Petition for writ of certiorari granted granted

App. 2

Post-Trial Opinion of the District Court on Liability

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 101-73-R

John Patterson, et al.,

Plaintiffs,

v.

The American Tobacco Co., et al.,

Defendants.

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,

Plaintiff,

v.

American Brands, Inc., et al.,

Defendants.

MEMORANDUM OPINION
Entered September 26, 1974

These actions, consolidated for trial, involve alleged sex and race discrimination in two plants and an administrative office of The American Tobacco Company (American) in Richmond, Virginia. Civil Action No. 101-73-R (Patterson) is brought pursuant to 42 U.S.C. § 1981 and Title

VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.)[1] as a private class action[2] seeking affirmative injunctive relief and back pay on the basis of past and continuing racial discrimination in employment practices, particularly with regard to seniority and job assignments resulting from the seniority.[3] Civil Action No. 104-73-R (EEOC) is also a Title VII action, but was brought by the Equal Employment Opportunity Commission (EEOC) pursuant to 42 U.S.C. § 2000e-5(f)(1). It contains allegations similar to those in Patterson with regard to employment practices and in addition alleges discrimination in hiring on the basis of race and sex discrimination. The Tobacco Workers' International Union (the International), a defendant in the Patterson action, is not named in the EEOC action. Local No. 182 of the International (the Local) is named a defendant in both actions.

---

[1] The Patterson action was originally brought only pursuant to 42 U.S.C. § 1981. Following receipt of a Notice of Right to Sue from the EEOC to certain named plaintiffs, the action, on March 12, 1973, was amended to include an allegation of violation of Title VII.

[2] The class has been defined as follows:

(1) All black persons, whether currently employed or retired, who were employees of the defendant company on or after July 2, 1964; and

(2) All black persons, whether currently employed or retired, who were employees of the defendant company on or after July 2, 1965, who were performing duties in jobs, the compensation for which was less than that for similarly situated white employees.

[3] On May 10, 1974, on plaintiffs' motion, an order was entered striking from the Amended Complaint in Patterson all allegations pertaining to discrimination in hiring on the basis of race. Since the trial of the case the plaintiffs in Patterson have filed, pursuant to Fed. R. Civ. P. 15(b), a motion to amend the complaint to conform to evidence introduced at the trial on the subject of hiring on the basis of race. That subject *was* included in the complaint by the EEOC at the time of trial. Consequently, the subject, even without the amendment sought by the Patterson plaintiffs, will be considered in this opinion.

Post-Trial Opinion of the District Court on Liability

The case was tried to the Court beginning July 15, 1974, limited to the issues of liability for back pay and injunctive relief. The issues as to the amount, method of calculation, and distribution of any back pay award are to be considered after resolution of the issues of liability and injunctive relief. The last of the post trial briefs was received on or about August 15, 1974.

For a more complete description of the parties and certain other facts, reference is made to Stipulation Number I, attached as Appendix I, which the Court adopts as part of its findings of fact.[4]

During and after trial, defendants renewed motions previously made for dismissal and summary judgment. These will be considered before reaching the merits of plaintiffs' allegations:

A. *The EEOC Action Was Not Timely Filed.*

This issue has now been decided, adversely to defendants, by EEOC v. Cleveland Mills Co., Civil No. 73-2298 (4th Cir., August 19, 1974).

B. *The Right Of EEOC To Sue Terminates Upon The Filing Of Patterson And Vice Versa.*

The "problem of duplicitous actions" referred to in *Cleveland Mills* is really no problem here. In the first place, when the Patterson suit was originally filed, on March 2, 1973, it was not a Title VII action; it did not become one until March 12, 1973. The EEOC action was filed on March 5, 1973. Second, there are significant differences, as heretofore set forth, between the actions, the only duplication

[4] Counsel for the defendant unions did not agree to Paragraphs 9, 10, 50 and 56 of the Stipulation; however, the Court finds that the statements of fact contained in those paragraphs are correct.

being on the issue of discrimination in promotional opportunities on the basis of race. Third, even if it were concluded that the plaintiffs in Patterson, instead of amending their complaint, should have intervened on this issue in the EEOC action, dismissal of either action would not be warranted. Here the consolidation of the actions has accomplished what intervention would have.

C. *The EEOC Has No Standing To Represent Females.*

American's position on standing, in essence, is that EEOC can only have that standing which the charging party, in this case Jenkins, would have had if he had brought a private action. Jenkins, a male, filed a charge with the EEOC alleging discrimination against males because of sex. EEOC in its complaint here charges discrimination against females because of sex. American says that because Jenkins could not bring a private action based on discrimination against females, neither can the EEOC. The Court does not agree. Such restriction on the adjudication of all the aspects of an issue such as sex discrimination runs counter to the liberal construction to which Title VII is entitled. This case is distinguishable from the cases which hold that where the charging party alleged only race discrimination before the EEOC, the EEOC cannot file a complaint alleging sex discrimination, although there is language in some of those cases which supports defendants' position.[5] It would be inconsistent with the remedial aims of Title VII to hold that once the tissue of sex discrimination had been presented to the Commission, the Commis-

[5] *EEOC* v. *New York Times Broadcasting Services, Inc.*, 364 F. Supp. 651 (W. D. Tenn. 1973); *King* v *Georgia Power Co.*, 295 F. Supp. 943 (N. D. Ga. 1968); *EEOC* v. *W. Elec. Co.*, Civil No. 73-448-N (D. Md., August 15, 1974). Contra: *Latino* v. *Rainbo Bakers, Inc.*, 358 F. Supp. 870 (D. Cal. 1975).

sion could only investigate discrimination against persons of the same gender as the person who made the charge. A proper investigation of that issue would almost necessarily involve inquiry into whether either sex was being discriminated against. Discovery of such discrimination without the ability to seek to alleviate it in accordance with 42 U.S.C. § 2000e-5(f)(1) would subvert the purpose of that provision. Certainly discrimination against both sexes was within "the scope of the EEOC investigation which can be reasonably expected to grow out of the charge of discrimination." *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970).

D. *All Claims Are Barred By The Virginia Statute of Limitations, Va. Code Ann. § 8-24.*

The cited Virginia statute does not mention 42 U.S.C. § 1981. It does mention 42 U.S.C. § 1983. Actions under the latter, according to the Virginia statute, must be brought within one year. Actions for back pay, such as the instant one, would clearly survive, and were this action solely for redress under § 1981, damages for back pay accruing prior to five years before the action was filed might not be recoverable. Under 42 U.S.C. § 2000e-5(g), however, back pay is allowable as an affirmative action if found appropriate to correct an unlawful employment practice. The liability for back pay under Title VII is limited to a period beginning two years prior to the filing of a charge with the Commission. 42 U.S.C. § 2000e-5(g). The charges were filed by the named plaintiffs in Patterson in January and February of 1969. The charge with respect to sex discrimination was filed with the EEOC on April 8, 1969. Although back pay would not be allowable earlier

than two years prior to those dates, it would be allowed, if appropriate, from that date forward.

If, as alleged, the violations are continuing in nature, there would be no statutory limitation bar to injunctive relief.

E. *The EEOC Action Should Be Dismissed As To The Local Union For Failure To Give The Union The Opportunity To Conciliate.*

Under the circumstances of this case, failure to offer formally the union an opportunity to conciliate prior to the filing of the law action, while perhaps technically a defect, is not a basis for dismissal of the action as to the union. On July 9, 1973, an offer to conciliate was formally made, *and accepted* on July 12, 1973 by the union. While unsuccessful, the efforts at conciliation were sufficient to meet the requirements of the act and to constitute substantial compliance therewith.

F. *None Of The Violations Is Of A Continuing Nature.*

As hereafter pointed out, while the present system of posting and bidding, employed by American since 1968, is facially fair and neutral, past acts of discrimination have resulted in present disparity of pay, present segregated job classifications and present promotional systems based on race and sex. These constitute, in the Court's view, continuing violations of Title VII.

* * *

The Court makes the findings of fact attached hereto as Appendix II, many of which as counsel will recognize, are adopted from portions of the proposed findings of fact submitted by the parties.

Post-Trial Opinion of the District Court on Liability

The facts listed are found with the full realization that statistics are often misleading; that certain of the plaintiffs' exhibits containing statistics do not support the conclusions attempted to be drawn from them by the plaintiffs; that the same is true for the defendants and some of their exhibits; and that on an individual basis some of the exhibits are in fact incorrect. The inference which the Court draws from the statistics overall, however, is that, except for the non-supervisory employees in the Richmond Office, there was and is disparate income by race and sex, segregated job classifications by race and sex, and promotional systems based on race and sex. Neither the statistics nor the other evidence of the plaintiffs warrant such an inference with regard to non-supervisory employees at the Richmond Office; however, supervisory positions at all three facilities have been practically closed to blacks and females until very recently.

The omission of any finding with regard to whether a particular job classification is under-evaluated is deliberate. Aside from the fact that the experts on both sides and their respective graphs (Pl's Ex. 48 and Deft's Ex. VB-22) were not particularly persuasive, the Court seriously questions the propriety of its determining whether a particular job is underevaluated or underpaid in actions such as these.

Likewise the failure to make any findings with regard to the filling of temporary vacancies is purposeful. The manner of filling such vacancies is complicated, and the present effect of past or present practices in that regard is too speculative to warrant the Court's making any finding that those practices have resulted in discrimination on account of race or sex.

The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further

implementation. As indicated in the findings of fact, however, black and female employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring.

Even without specific proof of overt or particular acts of discrimination,[6] the statistical evidence is more than sufficient to establish a *prima facie* case of discrimination for the two branches. Under now familiar principles, the burden of rebutting such a case or of showing that the discrimination is caused by business necessity accordingly shifts to the defendants. *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972). The defendants have failed to carry this burden. American takes the position that there is no discrimination and hence, with few exceptions, does not undertake to show any business necessity. Their statistics, their testimony that better jobs were available to the blacks and females who wanted them, and their evidence of efforts to eliminate any discrimination at the two branches are unpersuasive. The situation with regard to supervisory positions at all three facilities is particularly deplorable.

Hiring

The same cannot be said of hiring, however, except to the extent that discrimination in the selection of supervisory personnel can be considered discrimination in hiring

[6] Even if the named plaintiffs cannot show individual injury from discrimination, this, of course, does not deprive of a remedy the class of employees which the named plaintiffs represent. *Parham* v. *S. W. Bell Tel. Co.*, 433 F. 2d 421, 428 (8th Cir. 1970).

(and the Court does not so consider it, since such a substantial portion of the supervisory personnel is selected from the hourly-paid workers). In the Court's view, not only do the plaintiffs' statistics and other evidence not warrant an inference of discrimination insofar as hiring is concerned, but the statistics offered by the defendants and their evidence of affirmative efforts with regard to hiring rebut any *prima facie* showing made by the plaintiffs in this regard.[7]

Crafts

Nor are the plaintiffs entitled to relief with respect to the craft positions. The statistics reveal an unfortunate situation, to say the least, in craft positions for both blacks and females. The defendants' evidence, however, convinces the Court that, quite aside from any mechanical difficulty arising from the absence of the craft unions as parties, the absence of blacks and females is not the result of discrimination by American. Among the factors leading the Court to this finding are the relatively small number of craft positions existing in the plants, the small turnover in those positions, the scarcity of qualified craftsmen in the Richmond SMSA, the fact that recruiting for qualified persons has been conducted in a non-discriminatory way, and the efforts that have in fact been made to recruit blacks for those positions.

Union Involvement

Both the Local and the International disclaim any involvement in creating or fostering impermissible conditions

[7] This resolution of the hiring issue makes it unnecessary to decide the Patterson plaintiffs' motion to amend, discussed in Paragraph 2, *supra*. The Court's finding would be the same, however, even were the motion granted.

at American. Although wages are paid only by American, the local has been active in the fixing of wages, working conditions, and factors to be considered for promotions. Consequently it is "responsible," even if not solely, within the meaning of 42 U.S.C. § 2000e-5(g) for the unlawful employment practices. Moreover, the mandatory injunctive relief the Court intends to grant, involving possible changes in employee job positions and seniority contrary to terms of the existing contract between American and the union, requires that the Local be bound by any decree entered in the actions.

The International's disclaimer of involvement is refuted by the terms of the constitution of the Local which recites, in pertinent part:

> "...no collective bargaining and working agreements shall be consummated until first submitted to the General President [of the International] who may...approve or reject any proposed agreement and no such agreement can be executed without the approval of the General President...."

Plaintiffs' Ex. 53.

By its terms that Constitution constitutes a contract between the Local and the International unions. It, too, is responsible for the unlawful employment practices.

* * *

The Court concludes from the attached Stipulation and findings of fact and the foregoing that plaintiffs are entitled to the following relief:

A. An award of back pay, in favor of the hourly-paid blacks at the Richmond Branch and the Virginia Branch who are members of the class, as defined, and who have not "opted out," against American and the unions.

B. An award of back pay, in favor of the hourly-paid females in the Virginia Branch and the Richmond Branch, whether currently employed or retired, who were employees of American on or after July 2, 1965. and who were performing duties in jobs, the compensation for which was less than that for similarly situated male employees, against American and the unions.

C. An adjustment to the pension and profit-sharing plans to compensate for the effects of past discrimination.

D. An award of costs, including attorneys' fees to counsel for the plaintiff in Patterson.

E. An injunction providing:

1. A company-wide (i.e., Richmond Branch and Virginia Branch) seniority system for employees other than supervisory personnel.

2. An immediate company-wide posting and bidding on each non-supervisory job in the Richmond Branch and Virginia Branch, with no qualification except seniority and a willingness to learn the job; provided, that as to the jobs of adjuster, overhaul adjuster, and adjuster-prefabrication, the qualifications listed in finding 31 shall also be required. The existing posting and bidding procedure shall be followed; but in addition there shall be promulgated and posted a job description of each job classification posted. A reasonable time will be allowed to accomplish the foregoing. In the event, after that reasonable time, class members or females are found to have displaced an incumbent employee who has had to move to a job having a lower classification, such employee will have his or her wages "red-circled" until the wage level for the job he or she holds reaches the level at which he or she is being paid.

3. Insofar as supervisory personnel are concerned, in the Richmond Office, Richmond Branch and Virginia Branch, no vacancies therein shall be filled with other than females and blacks until the percentages of females and blacks in supervisory positions approximates the percentages of females and blacks in the total work force in the Richmond SMSA.

4. A written job description for supervisory jobs which will include, but should not be limited to, objective criteria for selection for or promotion to a supervisory position.

* * *

In formulating the above relief, the Court does not intend to mandate the awarding of a job to a person who is not qualified for it. Following a reasonable time, if an employee, whether supervisory, clerical, or factory worker, is unable to competently perform the job, he or she need not be retained in that job. This decision is to remain the employer's, and will not be disturbed absent a showing of discrimination.

The "bumping," which can occur under the relief awarded, will undoubtedly create morale problems, if not immediate economic problems, for those displaced. The relief is warranted, however, where past discrimination has allowed those persons greater job opportunity than more senior blacks and females.

The formulation of the method of calculation and distribution of the back pay award and adjustment to the pension and profit-sharing plans will be complex—sufficiently so as to tax the ingenuity and good faith of counsel. In this regard counsel are directed to confer with a view to agreeing on a plan of calculation and distribution of the back pay award for submission to the Court—and, indeed, to

explore the possibility of settling the monetary aspects of the case.

A decree should be prepared embodying, in more detail, the injunctive relief awarded, and providing for a method of calculation and distribution of the back pay award as well as adjustments to the pension and profit-sharing plans. If the latter cannot be agreed upon after thirty (30) days, counsel should notify the Court and a hearing will be scheduled. If the form of the decree, insofar as injunctive relief is concerned, cannot be agreed upon within a reasonable time, counsel should also notify the Court, and a hearing on that, perhaps combined with the other hearing, may be scheduled.

/s/ G. V. B., J.
United States District Judge

Alexandria, Virginia
September 25th, 1974.

Post-Trial Opinion of the District Court on Liability

APPENDIX I

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 101-73-R

John Patterson, Marion Moshoe, Edmund Page, James Randolph, Percy Taylor, each individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

The American Tobacco Company, a Division of American Brands, Inc., a corporation; Tobacco Workers' International Union, an unincorporated association; Local 182, Tobacco Workers International Union, an unincorporated association,

Defendants,

and

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,

Plaintiffs,

v.

The American Brands, Inc., d/b/a The American Tobacco Company; and Local 182, Tobacco Workers' International Union (AFL-CIO),

Defendants.

Post-Trial Opinion of the District Court on Liability

STIPULATION NUMBER I

The plaintiffs, John Patterson, et al., and the Equal Employment Opportunity Commission, and, the defendants, The American Tobacco Company, Local 182, Tobacco Workers' International Union, and the Tobacco Workers' International Union, do hereby stipulate and agree, subject to objection by any party as to the relevancy, competency, and materiality, of any statement contained herein and without in any way abridging the right of any party hereto to introduce additional evidence relating to any of the matters herein, as follows:

1. The defendant The American Tobacco Company, a division of American Brands, Inc., (hereinafter Company) is a corporation organized and existing under the laws of the State of New Jersey.

2. The defendant Company is an employer in an industry affecting commerce within the meaning of § 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b).

3. The defendant Company owns and operates the Virginia Branch for the purpose of manufacturing cigarettes in Richmond, Virginia.

4. The defendant Company owns and operates the Richmond Branch for the purpose of manufacturing smoking (pipe) tobacco in Richmond, Virginia.

5. Although the Virginia Branch and the Richmond Branch are under separate plant management, the defendant Company has on two occasions, the last occasion being between the years 1957-1959, permanently transferred employees from one Branch to the other.

6. An office staff which performs various accounting and record keeping duties for both the Richmond and Vir-

ginia Branches, is physically located at the Virginia Branch, and is designated as the Richmond Office.

7. The Shipping Department at the Virginia Branch ships the products of the Virginia and Richmond Branches.

8. The defendant Company does not maintain any written job descriptions for any of its job classifications at the Richmond and Virginia Branches.

9. Local No. 666 of The International Brotherhood of Electrical Workers (I.B.E.W.) has jurisdiction over the job classifications of electrician and electrician's helper at the Richmond and Virginia Branches of the defendant Company.

10. Richmond Lodge No. 10 of The International Association of Machinists and Aerospace Workers' (I.A.M.A.W.) has jurisdiction over the job classifications of machinists, machinist apprentice, welder, carpenter-millwright, brick or cement work, pipefitters, adjuster—prefabrication (Virginia Branch), adjuster helper—prefabrication (Virginia Branch), conveyor adjuster (Virginia Branch), and helper at the Richmond and Virginia Branches of the defendant Company.

11. All of the other job classifications for hourly employees, which are not under the jurisdiction of the I.B.E.W. or the I.A.M.A.W. Unions, are under the jurisdiction of Local 182 of the Tobacco Workers' International Union (T.W.I.U.).

12. From 1953 to the present, the defendant Company has had federal government contracts for the sale of some of its products.

13. The Company's first Equal Employment Opportunity program was drawn up in 1956, and the second pro-

gram was drawn up in 1962. (A copy of these programs is attached hereto as Exhibits A and B respectively.)

14. Beginning in 1956 the defendant Company conducted a program of plant modernization in the Prefabrication Department of the Virginia Branch which included the phase out of old machines and techniques and the initiation of new automated processes. As the result of this program, sixteen black employees were transferred to the Prefabrication Department and six were sent to the Richmond Branch between 1956 and 1958.

15. The Virginia Branch of the defendant Company is divided into two major departments—Prefabrication and Fabrication.

16. The Prefabrication Department at the Virginia Branch of the defendant Company is subdivided into the Turkish, Casing, and Cutting Departments.

17. The Fabrication Department at the Virginia Branch of the defendant Company is subdivided into the Making, Packing, Shipping, and Receiving Departments.

18. The Richmond Branch of the defendant Company is divided into two major departments—Prefabrication and Fabrication.

19. The Prefabrication Department at the Richmond Branch is subdivided into the Cooking, Dipping and Drying, Long Cut, Blended Stock, High Grade, Guardite, Stem Rolling, and Shipping and Receiving Departments.

20. The Fabrication Department at the Richmond Branch contains only the Packing Department.

21. Both the Richmond and Virginia Branches of the defendant Company have a Mechanical, Medical, and Clerical Staff.

22. Prior to September 16, 1963, the Company recognized two locals of the T.W.I.U. at the Richmond and Virginia Branches of the defendant Company. One of these Locals, No. 216, had an all black membership and had jurisdiction over job classifications located primarily in the Prefabrication Department of the Richmond and Virginia Branches of the defendant Company. The other T.W.I.U. Local, No. 182, had an all white membership and had jurisdiction over only those job classifications located in the Fabrication Department of the Richmond and Virginia Branches of the defendant Company.

23. Executive Order No. 10925, which was issued by President Kennedy and became effective on March 6, 1961, detailed specific penalties for a government contractor in noncompliance with federal requirements for equal employment opportunity.

24. Approximately 81% of the hourly paid workers in the Prefabrication Department of the Virginia Branch are black. None of the adjuster-prefabrication have ever been black.

25. At the present time, 2 of the 3 adjuster helpers—prefabrication at the Virginia Branch are black.

26. In order to become an adjuster—prefabrication, an employee must first serve as an adjuster helper—prefabrication.

27. In order to become an adjuster learner in the Fabrication Department of the Virginia Branch, it is necessary that an employee be a packing, Schmermund or making machine operator. Only packing and Schmermund machine operators are eligible to become adjuster learner-packers, and only making machine operators are eligible to become adjuster learner-makers.

28. The labor rates for hourly employees and for all job classifications at both the Richmond and Virginia Branches under the jurisdiction of Local 182 and former Local 216 of the Tobacco Workers' International Union have been negotiated for every contract period since 1937.

29. John Patterson was initially employed by the defendant Company as a tobacco tub handler at the Virginia Branch on April 4, 1946.

30. Percy Taylor was initially employed by the defendant Company as a laborer in the Prefabrication Department at the Virginia Branch on May 12, 1941 and was reemployed on September 19, 1944 after quitting on May 5, 1944.

31. James Randolph was initially employed by the defendant Company as a laborer in the Prefabrication Department of the Virginia Branch on September 23, 1952.

32. Marion Moshoe was initially employed by the defendant Company at the Richmond Branch as a laborer in the Prefabrication Department on February 3, 1958.

33. Edmund Page was initially employed by the defendant Company as a laborer in the Prefabrication Department of the Richmond Branch on August 20, 1948.

34. All of the named plaintiffs joined Local 216, T.W.I.U. after being hired by the defendant Company.

35. None of the named plaintiffs became members of the defendant Local 182 until September 16, 1963.

36. All of the named plaintiffs have been members of the defendant Local 182 since September 16, 1963, and are currently members of that Local.

37. The named plaintiffs are blacks who are currently employed as hourly production workers by the defendant Company at either the Richmond Branch or the Virginia Branch, and are members of the defendant Local 182 of the Tobacco Workers' International Union.

38. On January 15, 1968 the defendant Company instituted a system (which is still in effect) whereby permanent vacancies in classifications under the jurisdiction of Local 182 of the T.W.I.U. at both the Richmond and Virginia Branches were filled through job posting and employee bidding. Under this system, all such vacancies are posted on plant bulletin boards for seven working days. Anyone in the bargaining unit may sign any posting (bid on any job) with the exception of postings for vacancies in the adjuster, learner adjuster, examiner-making, examiner-packing, adt dryer operator, textile dryer operator, overhaul adjuster-making or packing, and turbine operators classifications at the Virginia Branch and adjuster and learner adjuster at the Richmond Branch.

39. Only employees who have become learner adjusters are eligible to move into vacancies in the adjuster classification.

40. Only employees who are experienced as a packing or making machine operator or Schmermund boxer operator are eligible to bid on vacancies in the learner adjuster classification.

41. Only employees who are experienced as a catcher are eligible to bid on vacancies in the examiner-making classification.

42. Only employees who are experienced as line searchers-Schmermund boxer are eligible to bid on vacancies in the examiner-packing classification.

43. Only those employees who have become an assistant adt dryer operator are eligible to move into vacancies in the adt dryer operator classification.

44. Only those employees who have become an assistant textile dryer operator are eligible to move into vacancies in the textile dryer operator classification.

45. Only those employees who have become a making or packing adjuster are eligible to move to vacancies in the overhaul adjuster classification.

46. Only those employees who have become an adjuster helper-prefabrication are eligible to move to the adjuster-prefabrication classification.

47. Only those employees who have become boiler operators are eligible to move into vacancies in the turbine operator classification.

48. The only formal or procedural requirement for an employee's bidding on a job, except those noted in No. 38, is for the employee to sign the posting in any location where it is displayed. When the posting is removed from the bulletin boards at the end of the seven working days, the plant seniority dates of all persons signing are compared and the most senior signer is given the first opportunity to learn the job.

49. As a general rule, since September 16, 1963, employees within the Local 182 of the T.W.I.U. bargaining unit are given preference for any vacancies in job classifications within the bargaining unit, and hiring is performed only for entry level jobs unless all of the employees refuse to accept a vacancy.

50. None of the job classifications under the jurisdiction of the I.B.E.W. or the I.A.M.A.W. Unions are subject to

the posting and bidding systems of filling permanent vacancies.

51. Under the posting and bidding procedure, once an employee has bid on and been awarded a permanent position, he/she enters into on-the-job-training wherein experienced employees who are already classified in a particular position instruct the employee new to the position as to the duties and responsibilities of the position.

52. If any employee decides within fourteen days after beginning his training period that he/she does not wish to accept the position, that employee can "sign off" the job and return to his/her former position.

53. If an employee decides after being assigned to a position for over fourteen days that he does not wish to accept that position, he may not "sign off" the job. However, he may sign another posting and, if he is successful, thereby remove himself from the first position.

54. There are no established limits on the length of time during which an employee may receive on-the-job training for any job classification at either the Richmond or Virginia Branch of the defendant Company.

55. The superintendent has the discretion to remove a trainee when in his opinion, after a reasonable period of time, that employee has not demonstrated that he can perform that particular job.

56. Prior to selecting an employee for promotion to a supervisory position, the defendant Company gives the local union an opportunity to make recommendations.

57. The defendant Company has never had an educational requirement for employees promoted from hourly production jobs to supervisory positions.

58. Hourly employees of the defendant Company do not have to apply or express their interest in holding a supervisory position in order to be considered for promotion to such a position.

59. The defendant Company does not have any written guidelines which are used in selecting supervisory personnel.

60. The selection of supervisors at the Richmond and Virginia Branches of the defendant Company is left to the discretion of those employees at the superintendent and manager levels of plant management.

Stipulated and agreed to this 24 day of June, 1974.

/s/ Henry L. Marsh, III
Counsel for Plaintiffs John Patterson, et al.

/s/ C. Daniel Karnes
Counsel for Plaintiff EEOC

/s/ Henry T. Wickham
Counsel for Defendant Company

/s/ Jay J. Levit
Counsel for Defendant Unions

Union Counsel does not stipulate to Nos. 9, 10, 50 & 56 for lack of sufficient information & reserves right to correct any other stip. mistakenly entered into.

/s/ J. J. L.

Exhibit A

Equal Job Opportunity

The following points were agreed to at the meeting held April 24, 1956, and constitute a plan of equal job oppor-

tunity in the manufacturing departments of the Company, in accordance with the clause in government contracts:

How many employees will be affected?

This was answered by saying that management would select the employees, as always there are employees who do not qualify for the new job and the individual employee has the right to refuse and stay on the job where he is satisfied.

Seniority status of employees moved to new jobs?

Employees given the opportunity to move in a new classification will advance in order of placement, and move backwards in reverse order, and, if necessary, return to the job from whence they came.

The jurisdiction?

The local that has jurisdiction and is bargaining for a particular classification will continue to hold jurisdiction and bargain for all employees in the classification, regardless of color or affiliation.

Racial problems?

If a problem of a racial nature becomes a grievance, the shop committee of both local unions will meet and agree on the unions' position, which will be presented to management for settlement in accordance with the grievance clause (Article 13) in the contract.

Employment?

New employees will be hired as to races on the basis of the approximate census in the plant area. This will be followed if applicants qualify for the job and are available when called.

Post-Trial Opinion of the District Court on Liability

Exhibit B

Equal Job Opportunity

There is equal job opportunity in accordance with the clause in government contracts. The following points represent the understanding of the Company and the Unions with respect to employees to whom the government contract clause is applicable and who are represented by the Unions:

Selection for New Jobs

Management will continue to select employees for new jobs on the basis of their qualifications and to recognize the right of an employee to refuse a new job and stay on the job where he is satisfied.

Seniority Status of Employees Moved to New Jobs

Employees given the opportunity to move in a new classification will advance in order of placement, and move backwards in reverse order, and, if necessary, return to the job from whence they came.

The Jurisdiction

The local that has jurisdiction and is bargaining for a particular classification will continue to hold jurisdiction and bargain for all employees in the classification, regardless of affiliation.

Grievances Where Locals Disagree

If a problem on which two locals disagree becomes a grievance, the shop committee of both local unions will meet and agree on the unions' position, which will be presented to management for settlement in accordance with Grievance Clause in the Union Contract.

Employment

The Company is an equal opportunity employer and, as such, will provide equal employment opportunities without regard to race, color, creed or national origin.

APPENDIX II

A. *Facts Relevant To The Issues Of Both Sex And Race Discrimination:*

1. American's facilities are located in the Richmond Standard Metropolitan Statistical Area (SMSA) which includes the City of Richmond and the counties of Henrico, Hanover and Chesterfield.

2. The 1960 census, which did not include Hanover County, shows:

Richmond SMSA Population	408,494	
Black Population	107,366	26%
Female Population	227,650	55%

3. The 1970 census, which included all the political subdivisions in the Richmond SMSA, shows:

Richmond SMSA Population	518,319	
Black Population	130,241	25%
Female Population	272,803	52%

4. The 1970-1973 Virginia Employment Commission estimate of the percent of the total work force which is comprised of blacks and females in the Richmond SMSA is as follows:

Minority (Black)	23.6% of the Total Work Force
Female	41.0% of the Total Work Force

5. The Richmond Office is located within the Virginia Branch. The Virginia Branch and the Richmond Branch, despite difference in street addresses,[1] are physically located

[1] The addresses of the Virginia Branch and the Richmond Branch, respectively, are 26th and Cary Streets and 21st and Grace Streets, Richmond, Virginia. A map, not to scale, showing the relative positions of the two plants, is attached as Appendix III.

very near one another. The presently practiced plant-wide seniority system, i.e., seniority determined within each of the three facilities, has, except with respect to the Richmond Office, contributed to the perpetuation of the discrimination found in finding 33 and 81. It has not been shown to be justified by any business necessity.

6. No new employees were hired to fill job classifications under the jurisdiction of the Tobacco Workers' International Union at the Virginia Branch from September 12, 1955 through May 12, 1966, nor at the Richmond Branch from September 12, 1955 through June 12, 1964.

7. Between September 16, 1963, and January 15, 1968, employees at the Virginia Branch were canvassed to determine if they were interested in procuring a position in a given job classification should a vacancy later occur.

8. Job "qualifications," as used between September 16, 1963, and January 15, 1968, were never reduced to writing. Employees learned of the specific "qualifications" either by talking to supervisory personnel or representatives of the union, or, by observing the system of promotion in operation. "Qualified," as used for this period, referred to whether or not an employee had filled a particular job before and was, in the opinion of supervisory personnel, familiar with it.

9. Employees who are permanently classified in jobs which are located in the Prefabrication Department of either branch of American generally fill temporary vacancies within the Prefabrication Department. Employees who are permanently classified in jobs which are located in the Fabrication Department of either branch of the defendant company generally fill temporary vacancies within the Fabrication Department.

10. Local 182 and the Tobacco Workers' International Union entered into collective bargaining agreements, governing, *inter alia,* wage rates for employees under its jurisdiction, which became effective in 1954, 1956, 1958, 1960, 1962, 1965, 1968, 1971 and 1974, respectively. The unions have jurisdiction over employees at the Richmond Branch and the Virginia Branch, but not the Richmond Office.

11. Supervisory personnel at the Virginia and Richmond Branches of American include the job classifications of assistant foreman, foreman, assistant superintendent, superintendent, assistant manager and manager.

12. Supervisory personnel at the Richmond and Virginia Branches of American have traditionally been either promoted from the ranks of the hourly employees, hired as new employees or transferred from other branches. Since 1960, 34% of the vacancies at the assistant foreman level have been filled by promoting former hourly employees of American.

13. Prior to selecting an employee for promotion to a supervisory position, American gives the local union an opportunity to make recommendations.

14. When the union and American's recommendation are not the same as to who should be promoted to a supervisory position, American's branch manager makes the final decision.

15. The defendant company has never had an educational requirement for employees promoted to supervisory positions from hourly production classifications.

16. Since July 1, 1965, at least eighteen employees have been hired for or promoted to the position of assistant foreman at the Virginia Branch.

17. Since July 1, 1965, at least nine employees have been hired for or promoted to the position of assistant foreman at the Richmond Branch.

18. Hourly employees of American do not have to apply for or express an interest in a supervisory position in order to be considered for promotion to such a position.

19. American does not have any written guidelines or objective standards which are used in selecting supervisory personnel.

20. Craft positions at the Virginia Branch include the job classifications of "machinist, machinist apprentice, electrician, electrician's helper, welder, carpenter-millwright, brick or cement worker, helper and pipefitter."

21. Craft positions at the Richmond Branch include the job classifications of machinist, machinist's helper, electrician, pipefitter, and carpenter.

22. Until 1971, American required that all applicants who are being considered for positions as clerks in the Richmond Office take the Minnesota Clerical Test. This test has never been certified as being either job related or predictive of job performance.

23. American has had a retirement plan for all of its employees at the Richmond and Virginia Branches since before 1942, and a profit-sharing plan since 1960.

24. An employee's share in profit-sharing and his benefits under the present retirement plan depend on yearly gross earnings.

25. Total employment[2] at the Virginia Branch declined

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[2] The findings with regard to employment by American are broken down into figures and percentages for the Virginia Branch, the Rich-

from 2,157 in 1953 to 1,027 in 1974. Factory workers declined from 1,476 in 1962 to 829 in 1974. Factory workers hired subsequent to May 16, 1966, were all hired into entry-level jobs and were not hired for any particular vacancy. There are no records to indicate the race of applicants from 1955 to February, 1972.

26. Total employment at the Richmond Branch declined from 399 in 1953 to 218 in 1973. Factory workers declined from 227 in 1962 to 156 in 1973. There are no records to indicate the race of applicants prior to March, 1972.

27. In 1961, the Richmond Office had 59 employees, excluding supervisors; and 1969 there were 69 such employees; and, on February 28, 1974, there were 55 such employees.

28. From January 1, 1963, to June 1, 1973, there have been over 55 vacancies in the assistant foreman position at the Virginia Branch.

29. From January 1, 1963 to June 1, 1973, there have been over 30 vacancies in the assistant foreman position at the Richmond Branch.

30. Since 1966, there have been 4 vacancies in the position of supervisor in the Richmond Office.

31. The so-called "lines of progression" described in Paragraphs 38 through 47 of Stipulation I (Appendix I), with the exception of the requirements described in Paragraph 39 (learner adjuster in order to become an adjuster), Paragraph 45 (making or packing adjuster in order to be-

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mond Branch and the Richmond Office. Because the Court finds that these three offices should be combined and considered as being at one location, the total figures have been considered for the purpose of the Court's ultimate findings.

come an overhaul adjuster) and Paragraph 46 (adjuster helper-prefabrication in order to become an adjuster-prefabrication) are not justified by any business necessity. The lines of progression other than these three have perpetuated past discrimination on the basis of sex and race.

B. *Facts Relevant To The Issue Of Race Discrimination:*

32. Prior to September 16, 1963, American discriminated on the basis of race with respect to facilities, union representation, wage structure, departments, seniority lines and hiring.

33. As a result of the low number of posted permanent vacancies at the Virginia and Richmond Branches, most black employees have been unable to move into the higher paying job classifications which had previously been restricted to whites. Consequently, a pattern of racially segregated job classifications and departments still exists in spite of American's adoption of a posting and bidding system.

34. Many of the positions in the job classification which were previously restricted to whites are now held by white employees, with less seniority than black employees, who were able to obtain these positions prior to 1968 by virtue of American's use of a racially discriminatory promotion system of plant seniority "plus qualifications," or by virtue of American's initial assignments of whites directly into these positions.

35. Black employees have received lesser amounts than white employees with comparable seniority under American's profit-sharing and retirement plans because of American's disparate wage structure and the inability of blacks to gain access to higher paying jobs.

36. Local 182 and The Tobacco Workers' International Union have negotiated and entered into labor agreements which have determined working conditions, wage rates, employee benefits and conditions for promotion. These have had the effect of continuing blacks in the lower paying, less desirable jobs at the Richmond and Virginia Branches.

37. Prior to 1963, black employees of American did not fill any temporary vacancies in job classifications which were restricted to whites. During that same period, white employees did not fill any temporary vacancies in job classifications which were restricted to blacks.

38. Prior to September 16, 1963, the Miscellaneous Department at the Virginia Branch contained two job classifications, "cleaner" and "elevator operator." All of the employees holding these classifications in this department were black. During this period, these employees were responsible for manual materials handling, by-products removal from the production floors, and cleaning the fabrication cafeteria eating area and two fabrication rest rooms.

39. For the years 1965 through 1973, black hourly-paid production workers at the Virginia Branch generally had a lower mean income than whites with equivalent plant seniority.

40. For the years 1965 through 1973, black hourly-paid production workers at the Richmond Branch generally had a lower mean income than whites with equivalent plant seniority.

41. Jobs in the Prefabrication Department of the Richmond Branch historically have had lower wage rates than jobs in the Fabrication Department of that Branch.

42. Jobs in the Prefabrication Department of the Vir-

ginia Branch have generally had lower wage rates than jobs in the Fabrication Department of that Branch.

43. Traditionally at both branches there have been more blacks in the Prefabrication Department than whites, and more whites in the Fabrication Department than blacks.

44. Jobs at the Richmond Branch have traditionally had lower wage rates than jobs at the Virginia Branch.

45. The job classification of "operator-guardite" has traditionally had the highest wage rate of any job in the Prefabrication Department of the Richmond Branch. When this classification was first introduced, the defendant company transferred two white males from the Fabrication Department, one to operate a guardite machine and the other to serve as supervisor in the guardite operation in the Prefabrication Department. All of the other employees in the guardite operation were black. There has, however, only been one guardite machine operator, a white male, who has held the job since its inception.

46.[a] As of February 26, 1963, 196 or 11.8% of the 1,653 employees at the Virginia Branch of the defendant company were black. As of January 15, 1963, of the approximate 100 supervisors none was black.

47. The first black supervisor at the Virginia Branch was promoted from the ranks of the hourly employees by American on January 16, 1963.

48. As of May 16, 1969, of the 71 employees in supervisory positions at the Virginia Branch of American, 3 were black.

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[a] The percentages in this and subsequent findings, namely 46, 49, 52, 54 and 55, while apparently in some instance inconsistent with the finding in Paragraphs 70, 71, 72 and 73, cover years not covered by the latter and include all employees as opposed to just factory workers.

49. As of April 16, 1973, 165, or 15.49% of the 1,071 employees at the Virginia Branch of the defendant company were black. As of April 16, 1973, 5 or 7.24% of the 69 employees in supervisory positions at the Virginia Branch were black.

50. As of January 1, 1974, there were 6 black supervisors at the Virginia Branch.

51. The first black supervisor at the Richmond Branch was promoted from the ranks of the hourly employees on June 1, 1966, and was assigned to the Prefabrication Department.

52. As of April 17, 1967, 79 or 32.1% of the 246 employees at the Richmond Branch were black.

53. The second black supervisor at the Richmond Branch was promoted from the ranks of the hourly employees on February 1, 1971.

54. As of March 10, 1971, 82 or 36.7% of the 223 employees at the Richmond Branch were black. On that same date 2 or 6.6% of the 30 employees in supervisory positions at the Richmond Branch were black.

55. As of April 16, 1973, 85 or 40.67% of the 209 employees at the Richmond Branch were black.

56. As of June 1, 1973, 3 or 9.6% of the 31 employees in supervisory positions at the Richmond Branch were black.

57. As of April 15, 1973, 250 or 19.53% of the 1,280 employees at both Branches of American were black.

58. Only one black has ever held any of the positions of machinist, machinist's helper, electrician, pipefitter or carpenter at the Richmond Branch.

59. None of the employees who completed their apprenticeships at the Virginia Branch was black.

60. One of the employees who completed his apprenticeship at the Richmond Branch was black. This employee, Mr. Frank Schools, is the only black ever employed in a craft position at the Richmond Branch.

61. Only three blacks have ever been employed as craftsmen at the Virginia Branch.

62. As of April 12, 1974, 62 persons were employed in the Richmond Office, 13 of whom were black. The total work force is made up of 55 clerical employees, 6 supervisory employees, and 1 office manager. All of the black employees were classified as clerks.

The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a black.

63. Although John Patterson was initially assigned to the Fabrication Department of the Virginia Branch on April 4, 1946, he could not be classified in most of the job classifications in that department until September 16, 1963, because he was black.

64. Percy Taylor and James Randolph were not eligible to hold most of the job classifications in the Fabrication Department of the Virginia Branch, including those of "Packing or Making Machine Operators," until September 16, 1963, because they were black.

65. During the period from 1954 to 1971, American sometimes assigned Marion Moshoe, a black and a named plaintiff, to various machines in the Prefabrication Department as an operator. While performing these assignments, he would be paid at the lower laborer wage rate.

66. From 1960 to the present time, Edmund Page, a black and a named plaintiff, has been classified as an "op-

erator-prefabrication and other equipment." Employees in this classification may operate as many as eight different machines. All of the employees in this classification are paid at the same wage rate.

67. All of the named plaintiffs in Patterson joined Local 216, T.W.I.U., after being hired by the defendant company.

68. None of the named plaintiffs in Patterson or members of the class they represent was eligible for membership in Local 182 until September 16, 1963, because they were black.

69. All of the named plaintiffs in Patterson have been members of Local 182 since September 16, 1963, and are currently members of that Local.

70.[4] Although there are no statistics with respect to any applicants before 1972, the evidence reveals that of those persons hired into factory positions at the Virginia Branch, from 1966, when hiring began, through 1973, 152 were black and 69 were white. A breakdown of these is as follows:

	White		Black	
1966	14	(32%)	30	(68%)
1967	5	(24%)	16	(76%)
1968	14	(36%)	25	(64%)
1969	5	(45%)	6	(55%)
1970	7	(35%)	13	(65%)
1971	None		None	
1972	1	(06%)	17	(94%)
1973	23	(34%)	45	(66%)
Totals	69	(31%)	152	(69%)

[4] The statistics in findings numbered 70, 71, 72 and 73 refer to "factory workers." These findings are taken from evidence offered by American and apparently exclude supervisory personnel and others.

71. The percentage of black factory workers at the Virginia Branch from 1962 to February 28, 1974, is as follows:

Date	Blacks	Total	Percent Black
1962	201	1,476	14%
1963	193	1,441	13%
1964	188	1,397	13%
1965	169	1,321	13%
1966	160	1,263	13%
1967	191	1,218	16%
1968	175	1,151	15%
1969	173	1,099	16%
1970	161	1,046	15%
1971	157	995	16%
1972	145	923	16%
1973	149	864	17%
1974 (2/28)	169	829	20%

72. Of the persons hired into the Richmond Branch from 1964 to 1973, 133 were black and 33 were white. A breakdown by year of these is as follows:

	White		Black	
1964	5	(38%)	8	(62%)
1965 and 1966	no hiring			
1967	1	(14%)	6	(86%)
1968	11	(31%)	24	(69%)
1969	0	(0%)	6	(100%)
1970	7	(37%)	12	(63%)
1971	2	(13%)	13	(87%)
1972	6	(16%)	32	(84%)
1973	1	(03%)	32	(97%)
Totals	33	(20%)	133	(80%)

73. The percentage of black factory workers at the Rich-

mond Branch in 1962, 1964, 1966, 1968, 1970, 1972 and 1973 was:

Date	Blacks	Total	Percent Black
1962	93	227	41%
1964	93	228	41%
1966	78	190	41%
1968	89	189	47%
1970	80	164	49%
1972	79	151	52%
1973	90	156	58%

74. In 1973, approximately 47% (27 persons) of the total applications for jobs were filed by blacks and 40% (6 persons) of the total number of hires were black in the Richmond Office. The race of four applicants is unknown.

75. In the Richmond Office, from 1961 to 1974, 17% (22 persons) of all persons hired were black; from 1965 to 1974, 18% (17 persons) of all persons hired were black; and, from 1970 to 1974, 42% (10 persons) of all persons hired were black.

In 1961 there were no black employees in the Richmond Office. In 1974, 24% (13 persons) of the non-supervisory employees were black.

76. There are approximately two hundred non-craft hourly paid job classifications at the Virginia Branch. As of 1973 there were eighteen which had never been held by a white employee, and ten which had never been held by a black employee.

77. There are approximately 43 non-craft hourly paid job classifications at the Richmond Branch. As of 1973 there were twenty-one which had never been held by a white employee; and nine which had never been held by a black employee.

78. The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a black employee.

79. Since 1966, there have been four vacancies in the position of supervisor in the Richmond Office. One supervisory vacancy in 1966 was filled by a white male employee who had less seniority than several white females in the Richmond Office. Two supervisory positions were filled on August 1, 1973, by white male employees transferred from the Charleston Branch which was being phased out. One of these two employees had been the office manager at the Charleston Branch, while the other had been an office supervisor in that office. As of April 12, 1974, there was one unfilled supervisory position in the Richmond Office.

C. *Facts Relevant To The Issues Of Sex Discrimination:*

80. Prior to September 16, 1963, American discriminated on the basis of sex with respect to wage structure, departments, seniority lines and hiring.

81. The same finding, except with regard to sex instead of race, is made as in finding 33.

82. As of January 15, 1963, of the approximately 1,653 employees at the Virginia Branch of the defendant company there were approximately 100 supervisors of which none was female.

83. As of May 16, 1969, of the 71 employees in supervisory positions at the Virginia Branch of American none was female.

84. As of April 16, 1973, 453 or 42.3% of the employees at the Virginia Branch were female. As of April 16, 1973, of the 69 employees in supervisory positions, 3 or 4.34% were female.

85. As of April 17, 1967, 107 or 43.5% of the employees at the Richmond Branch were female.

86. As of February 1, 1971, none of the 30 supervisors at the Richmond Branch were female, with the exception of the office supervisor.

87. As of April 16, 1973, 32% of the employees at the Richmond Branch were female.

88. As of June 1, 1973, 31 employees in supervisory positions at the Richmond Branch, 2 or 6.4% were female.

89. In 1972, 18.3% (26 persons) of the total applications for jobs were filed by females and none was hired at the Virginia Branch. In 1973, 39% (274 persons) of the total applications for jobs were filed by females and 19% (12 persons) of the total hires were female.

90. The percentage of female factory workers at the Virginia Branch from 1962 to February 28, 1974, is as follows:

Date	Females	Total	Percent Females
1962	687	1,476	47%
1963	675	1,441	47%
1964	663	1,397	47%
1965	629	1,321	48%
1966	607	1,263	48%
1967	578	1,218	47%
1968	531	1,151	46%
1969	505	1,099	46%
1970	478	1,046	46%
1971	453	995	46%
1972	418	923	45%
1973	385	864	45%
1974 (2/28)	359	829	43%

91. In 1972, 12% (39 persons) of the total applications for jobs were filed by females and none was hired at the Richmond Branch. In 1973, 30% (146 persons) of the total applications for jobs were filed by females and 30% (10 persons) of the total hires were female.

92. The percent of female factory workers at the Richmond Branch in 1962, 1964, 1966, 1968, 1970, 1972 and 1973 was:

Date	Females	Total	Percent Females
1962	109	227	48%
1964	109	228	48%
1966	89	190	47%
1968	89	189	47%
1970	66	164	40%
1972	54	151	36%
1973	56	156	36%

93. During the period 1961 to 1974, approximately 93% of all persons hired at the Richmond Office were female and in 1974, 89% (49 persons) were female. In 1961, 75% (44 persons) of the non-supervisory employees were female and in 1974, 89% (49 persons) were female.

94. There are approximately two hundred non-craft hourly paid job classifications at the Virginia Branch. As of 1973, there were thirty-three such positions which had never been held by a female employee, and six which had never been held by a male employee.

95. There are approximately 43 non-craft hourly paid job classifications at the Richmond Branch. As of 1973, there were thirty-two such positions which had never been held by a female employee, and six which had never been held by a male employee.

96. Until at least September 16, 1963, American considered the following Virginia Branch job classifications to be "male" classifications:

Adjuster—Overhaul—Making and Packing
Adjuster—Controller
Adjuster—Making—From Filter Operator (for 7 Machines)
Adjuster—Making and Packing—70 mm or 85 mm (13-14-15 Machines)
Operator—Turbine
Adjuster—Making and Packing—70 mm or 85 mm (up to and including 12 Machines)
Operator—Boiler
Painter—Spray
Operator—Air Conditioning
Painters—Brush
Cigarette—Drum Maintenance
Operator—Making—Filter Tip—1250 Cpm.
Operator—Making (Combination Unit)—All Lengths—1500 Cpm.
Operator—Packing (with Combination Unit or Pneumatic System) All Lengths—with Automatic Package Handling—150 ppm.
Operator and Relief—Making—85 mm Filter (1050 cpm.)
Operator—Making (Combination Unit)—70 mm (1250 cpm.) and 85 mm (1125 cpm.)
Operator—Packing Machine (Combination Unit)—70 mm (125.5 ppm.) and 85 mm (112.5 ppm.)
Tractor Trailer Drivers
Operator and Relief—Box Machines—2 Machines (over 15 packers)
Adjuster—Learner (Making and Packing—70 mm and 85 mm)

Cutting Stamps
Operator and Relief—Box Machines—2 Machines (thru 15 Packers)
Operator—Container Packer (25 or more Machines)
Operator and Relief—Making and Packing—70 mm (1125 cpm. (112.5 ppm.) and 85 mm 930 cpm.) (105 ppm.)
Operator—Dryer (Textile or Adt)
Operator—Container Packer (from 17 through 25 Machines)
Truck Driver
Crew Leader—Shipping
Operator—Hot Sealing Machine (Export)
Strapping and/or Sealing Containers (Export)
Cooking Dip and Invert
Past Cook
Packers and Checkers—Shipping
Operator—Industrial Trucks
Chauffeurs—Light Delivery
Operator and Relief—Box Machines—1 Machine (over 8 Packers)
Operator Assistant—Dryer (Textile and Adt)
Operator—Overshot Cylinder and Overshot Cylinder and Mixing
Operator—Wringing Machine
Sealing Containers
Stock Handlers—Shipping
Truck Helpers
Oiler
Operator—Container Packer (up thru 16 Machines)
Watchman
Operator and Relief—Box Machines—1 Machine (thru 8 Packers)
Operator—Scrubbing Machine

Coal Handlers
Bulker—Strip Tobacco
Factory Supply and Floorman
Hopper Fillers
Lay Out Supplies
Making Flavoring Helper
Operator—Tag Meter
Weighers and Handlers (Turkish)
Cooking Dip and Invert Helper
Bulker—Cut Tobacco
Bulker—Trucking Leaf
Feeders—Strip Stems or Shorts
General Helper
Operator—Palletizing Truck
Silver Machine Man
Sweco and Air Table Man
Machine Cleaners
Baking Scrap Paper
Cleaners (Male)
Cleaners—Air Conditioning System
Dressing Cut Tobacco
Feeder—Casing Department
Floor Labor
Material Supply Distribution
Operator—Elevator
Receiving and/or Handling Supplies

97. Until at least September 16, 1963, American considered the following Virginia job classifications to be "female" classifications:

Closing and Sealing Containers (Female)—Export
Forming and Inserting Bags in Containers—Export
Packing Containers—Export

Relief—Export
Examiners—Automatic
Catcher—Filter Tip—1250 cpm.
Catchers and Relief (Combination Unit—All Lengths—1500 cpm.)
Cigarette Paper Records
Cigarette Weighing—Individual
Examiners—Manual
Sieve Testing
Catchers and Relief—70 mm (up to 1125 cpm.)
Catchers and Relief—70 mm (1250 cpm.) and 85 mm (1125 cpm.) Combination Units
Packing in Cartons—Combination Unit
Packing Containers by Hand—85 mm (Female)—More than 6 Packing Machines
Stencil Cutters
Catchers and Relief—70 mm (up to 1025 cpm.) 85 mm (up to 930 cpm.)
Packing Containers by Hand—85 mm (Female)—6 Packing Machines or less
Packing into Cartons and Relief
Carton Searchers
Rehandler
Packing Container by Hand—70 mm (Female)
Feeders—Cutting Machine (Female)
Cleaners (Female)
Feeders—(Female)
Pickers and Searchers (Female)

98. For the years 1965 through 1972, female hourly paid production workers at the Virginia Branch had a lower mean income than males with comparable seniority.

99. For the years 1967 through 1972, female hourly

paid production workers at the Virginia Branch had a lower mean income than males with comparable seniority.

100. In 1972, American selected from the ranks of its hourly production workers its first female supervisor at the Virginia Branch, to fill the position of assistant foreman. At that time approximately 43% (490) of the total Virginia Branch work force was female.

101. As of June 1, 1973, there were three female assistant foremen at the Virginia Branch out of a total supervisory staff of 73. Thus, of the supervisors at the Virginia Branch 4 percent were female.

102. In 1967, American selected from the ranks of the hourly production workers its first female supervisor at the Richmond Branch to fill the position of assistant foreman. At the time approximately 31% (107) of the total Richmond work force was female.

103. As of June 1, 1973, there were thirty-one supervisors at the Richmond Branch of whom two (6%) were females.

104. No female has ever held a craft position at the Virginia Branch.

105. No female has ever held a craft position at the Richmond Branch.

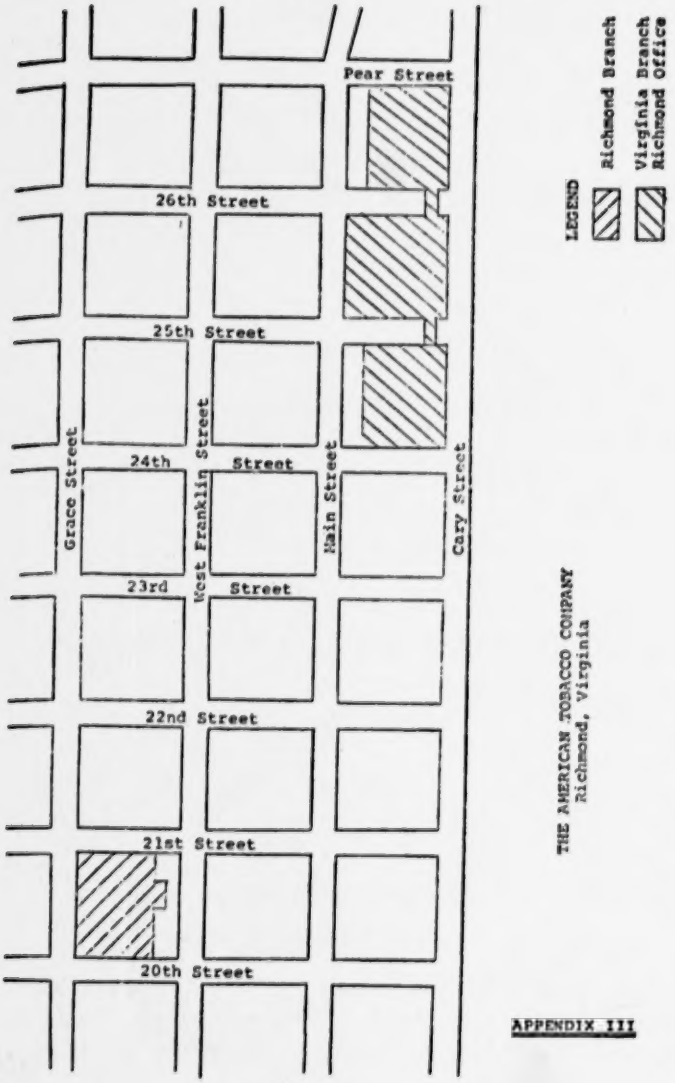
106. The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a female employee.

107. Since 1966, there have been four vacancies in the position of supervisor in the Richmond Office. One supervisory vacancy in 1966 was filled by a white male employee who had less seniority than several white females in the

Richmond Office. Two supervisory positions were filled on August 1, 1973, by white male employees transferred from the Charleston Branch which was being phased out. One of these two employees had been the office manager at the Charleston Branch, while the other had been an office supervisor at that office. As of April 12, 1974, there was one unfilled supervisory position in the Richmond Office.

Post-Trial Opinion of the District Court on Liability

Appendix III



* * *

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 101-73-R

John Patterson, et al.,

Plaintiffs,

v.

The American Tobacco Co., et al.,

Defendants.

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,

Plaintiff,

v.

American Brands, Inc., et al.,

Defendants.

MEMORANDUM OPINION

Entered December 31, 1974

The Court has considered the defendants' Motion to Amend and Supplement Findings of Fact and Conclusions of Law and Motion to Proffer Additional Evidence, the

plaintiffs' Motion to Alter Judgment and the proposed decrees and objections thereto submitted by the parties.

Statute of Limitations

The plaintiffs' Motion to Alter Judgment is addressed to the applicable limitation for the back pay award. The Court adheres to its original conclusion that under 42 U.S.C. § 1981 the limitation is five years prior to March 2, 1973, which would be March 2, 1968, if the claims here asserted were limited to 42 U.S.C. § 1981. They are not so limited, however, since Title VII claims are asserted, as a result of which the back pay awards may go back as far as two years prior to the filing of charges with the EEOC, i.e., until January or February, 1967, for race discrimination and until April, 1967, for the sex discrimination.

The Court further concludes that the five year limitation is not tolled during the pendency of the charges before the EEOC. There is respectable authority to the contrary;[1] however, the two claims are separate and independent and there seems to be no persuasive reason to treat the instant claim differently from other separate and independent ones, a treatment which does not, traditionally, toll the limitation of one claim while another is being administratively pursued. *Johnson* v. *Railway Express Agency, Inc.*, 489 F.2d 525, 531 (6th Cir. 1973), *cert. granted* 417 U.S. 929 (1974) (No. 73-1543; argued Dec. 11, 1974). While there may be policy reasons for such tolling, in the Court's view those should be left to the wisdom of the legislative branch of government.

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[1] *Pattway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 258 (5th Cir., 1974); *Brandreaux* v. *Marine Contracting Co.*, 437 F. 2d 1011, 1017 n. 16 (5th Cir., 1971).

Opinion of the District Court on Relief and Decree

American's Motion to Amend and Supplement and to Proffer Additional Evidence

The Court has examined the detailed amendments and supplements requested, and while it hesitates to treat the motions, obviously prepared with sincerity and industriousness, in a summary manner, the requests are in actuality a reargument of the merits of the actions. No finding of substance is requested that has not been requested before. No piece of evidence now cited in support of the request has not been considered previously. The changes requested as to form are unnecessary in the Court's opinion, and the requested supplemental findings are adequately covered in existing ones. The Motion to Amend and Supplement is accordingly denied.

The Motion to Proffer Additional Evidence must also be denied. The case was thoroughly and skillfully presented on July 15, 1974, *et seq.*, by all parties. If additional evidence is presented now by the defendants, other parties will legitimately be entitled to offer additional evidence. It is time these actions, now nearly two years old, came to a conclusion, at least at the trial level. Even after this Memorandum and the entry of the attached decree, there is yet the question of damages. The request for oral argument at this stage, however, is also denied.

The Decree

The Court has this day entered a Decree in the actions. As the parties will recognize, it is substantially the decree as proposed by the plaintiffs. Minor changes, among others, include alterations in some time limits, a less frequent reporting requirement, and additions to reflect the Court's

ruling on the applicable limitation with respect to back pay. In addition a change of some substance has been made in the manner of selecting new jobs by members of the two classes. The viewing of jobs by the class member has been postponed until after he knows for which jobs he can qualify. The provision for sixteen hour tryout on the jobs selected has been eliminated, because the Court feels this to be wasteful and unnecessary so long as the class member has an opportunity to make an informed choice as to the job he wants. This opportunity is amply afforded by the job descriptions, the tour and the view.

The Court has some reservations about the accuracy with which the Company can determine the three jobs for which a class member, particularly one with low seniority, is eligible. Presumably plaintiffs have considered this practical problem in making their proposal, and if it can be accomplished the Court feels that this is the desirable way to proceed.

The Decree has been entered after giving due consideration to American's contention that its terms will create disruption in the efficient running of American's business. Undoubtedly some disruption is unavoidable. The Court doubts that it will be to the extent voiced by the Company and hopes that it will not be. If, however, carrying out the terms of the Decree results in an inefficient operation for two or three days, or even as much as ten days, the past inequities clearly warrant this temporary loss to eliminate the present effects of those inequities.

The Court would like a prompt hearing to determine the method of calculation and distribution of the back pay award and adjustment to the pension and profit-sharing plans, and to what extent, if any, additional evidence will be necessary to effectuate these determinations. The after-

noons of January 10, 17, 24 and 31, 1975, in Alexandria, are available for the Court. If it is inconvenient to counsel to come to Alexandria, arrangements can be made for such a hearing in Richmond.

/s/

United States District Judge

Alexandria, Virginia
December 31st, 1974

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 101-73-R

John Patterson, et al.,

Plaintiffs,

v.

The American Tobacco Co., et al.,

Defendants.

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,

Plaintiff,

v.

American Brands, Inc., et al.,

Defendants.

DECREE

These cases, *John Patterson, et al.* v. *The American Tobacco Co.*,[1] *Tobacco Workers International Union and Local 182, Tobacco Workers International Union* (Civil

[1] All references herein to "American" are to the facilities of The American Tobacco Company, a division of American Brands, Inc., known as the Virginia Branch, the Richmond Branch, and the Richmond Office.

Action No. 101-73-R), and *Equal Employment Opportunity Commission* v. *American Brands, Inc. and Local 182, Tobacco Workers International Union* (Civil Action No. 104-73-R), which were consolidated for trial, came on before the Court, sitting without a jury, in July, 1974, limited to the issues of liability for back pay and injunctive relief and those issues having been heard and duly tried, and a Memorandum Opinion[2] and Findings of Fact having been filed by the Court on September 25, 1974, it is now ADJUDGED, ORDERED and DECREED:

The defendants, The American Tobacco Company ("American" or "the Company"), the Tobacco Workers International Union ("International Union"),[3] and Local 182, Tobacco Workers International Union ("Local 182" or "TWIU"), their officers, agents, employees and servants and all persons in active concert or participating with them shall be and are hereby permanently enjoined and restrained from discriminating against the affected classes of black and female employees of the Company as herein described because of their race or sex in violation of Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and The Civil Rights Act of 1866, 42 U.S.C. § 1981, at the Company's Richmond Branch, Virginia Branch and Richmond Office located in Richmond, Virginia.

[2] Pursuant to the Court's request, counsel for all parties have conferred and have submitted individual proposed decrees, which have been examined by the Court. Because, in some instances the Court has adopted the proposed language of one or more of the parties, portions of this Decree may vary from the provisions of the Memorandum Opinion; whenever such variations occur, it is the Court's intent that this Decree should be controlling.

[3] The Tobacco Workers International Union ("the International") is not a defendant in the EEOC action (Civil Action No. 104-73-R). In addition to the allegations of racial discrimination raised in *Patterson* (Civil Action No. 101-73-R) the EEOC action contains allegations of sex discrimination. None of the provisions of this decree pertaining to sex discrimination is applicable to the International.

Opinion of the District Court on Relief and Decree

I. *The Class and the Affected Class*

1. The class of blacks (Class I) for the purposes of this Decree shall consist of:

> All black persons, whether currently employed or not, who were employees of the defendant Company on or after July 2, 1965.

2. The affected class of females (Class II) for the purposes of this Decree shall consist of:

> All females, whether currently employed or not, who were employees of the defendant Company on or after July 2, 1965.

II. *The Seniority System*

1. The defendants are enjoined from implementing, maintaining, or giving effect to any seniority system, whether pursuant to any collective bargaining agreement or otherwise, which is designed to discriminate or has the effect of discriminating against members of Class I or Class II.

2. The Company shall compile within thirty (30) days from the entry of this Decree:

A. A list of all current employees in order of Company seniority in the TWIU bargaining unit at the Richmond and Virginia Branches indicating race, sex, Company seniority date, branch, job classification and employee identification number.

B. A list of all current black employees as of the date of this Decree, who have worked for the Company at any time since July 2, 1965, in order of Company seniority indicating Company seniority date, sex, branch, current job classification and employee identification number.

C. A list of all black employees who have worked for the Company at any time since July 2, 1965, who are no longer working for the Company for any reason, indicating the employee's name, sex, branch, Company seniority date, date of termination, reason for termination and employee identification number.

D. A list of all current female employees as of the date of this Decree, who have worked for the Company at any time since July 2, 1965, in order of Company seniority indicating Company seniority date, branch, race, current job classification and employee identification number.

E. A list of all female employees who have worked for the Company at any time since July 2, 1965, who are no longer working for the Company for any reason indicating the employee's name, race, Company seniority date, branch, date of termination, reason for termination and employee identification number.

F. A list of all job classifications by branch in the TWIU bargaining unit (excluding adjuster and overhaul adjuster) by order of wage rate, indicating the number of positions in each classification and the name, Company seniority date, race, sex and employee identification number of each incumbent employee.

3. Within thirty (30) days from the entry of this Decree, the above lists shall be filed with the Court and served on counsel for plaintiffs and the unions. In addition, the list in Section II, 2, A, shall be posted in the normal posting locations at each Branch and shall remain posted until the provisions of Section II of this Decree are concluded.

4. The Company shall implement for TWIU bargaining unit jobs at the Richmond and Virginia Branches the

procedure set forth in Paragraphs 5 through 11 below. For the purposes of this procedure, no job qualifications shall be required except the requisite seniority and a willingness to learn the job; provided, however, that for the jobs of adjuster and overhaul adjuster the qualifications listed in Finding of Fact No. 31 shall remain in effect.

5. American shall prepare job descriptions for all TWIU bargaining unit jobs within thirty (30) days after the entry of this Decree, which descriptions (a) are for informational purposes only, (b) are not intended to indicate all of the duties to be performed, and (c) will be used for no purpose other than to inform employees of the general nature of such jobs. Unless plaintiffs object to the job description and provide suggested modifications within fifteen (15) days after receiving a copy of them, such descriptions will be deemed to comply with this Decree. A copy of such job description shall be posted on bulletin boards located in conspicuous places at the Richmond and Virginia Branches and a copy shall be furnished to any employee who requests the same.

6. Within fifteen (15) days after copies of job descriptions are posted, all currently employed blacks and females in the TWIU bargaining unit shall be given an opportunity to tour both the Richmond Branch and the Virginia Branch. No such person need be given an opportunity to tour any department to which he has been assigned for thirty (30) days or longer.

A. Within ten (10) days after the expiration of the period prescribed in the preceeding paragraph, all currently employed members of Class I and Class II shall be given the opportunity to select not more than five jobs in order of preference.

B. Within ten (10) days after the expiration of the period described in Section II, 6, A, the Company shall determine the top three jobs on each class member's preference list that the Company reasonably anticipates such class member's seniority would permit him[4] to hold. Should the Company conclude that a Class I or Class II member's seniority would not permit him to ascend to at least three of the jobs on such preference list, that class member shall be given the opportunity to list additional jobs, totaling five when combined with the number of jobs the Company already has anticipated he would hold. The Company again shall determine if such class member's seniority would permit him to ascend to any of the jobs newly selected. This process shall be repeated until there are at least three jobs on such class member's list that the Company reasonably anticipates would be available to him. If it is determined that a class member's seniority would not permit him to ascend to any job of his selection, *that class member shall remain in his original job.*

Seniority as used herein is the length of Company service from the most recent date of Company employment.

C. Within thirty (30) days after the expiration of the period prescribed in Section II, 6, B, all currently employed members of Class I and Class II shall be given the opportunity to view the three jobs selected pursuant to that paragraph in operation for a period of not more than one hour each.

7. A. Within five (5) days from the completion of the procedure set forth in Section II, 6 above, each currently employed black and female shall be canvassed personally in the order of decreasing seniority at which time such

[4] All references to either gender shall be construed as applying to both genders throughout this Decree.

person shall be given the final opportunity to select the job to which his seniority would entitle him. Any employee who would be displaced from his present job as the result of the "bumping" rights afforded blacks and females under the provisions of this paragraph shall be entitled during the canvass process to select another job to which his seniority would entitle him, and each employee successively displaced shall be entitled to the same right.

B. Upon completion of the canvass, American shall commence implementation of the "bumping" process in order of decreasing seniority.

8. Should such employee entitled to the "bumping" rights as set forth in Section II, 7, elect not to exercise such rights, such election shall be made in writing on the form attached hereto as Exhibit A.

9. Any employee who should elect to exercise the "bumping" rights as set forth in Section II, 7, may elect to be removed from his selected job within fourteen (14) working days after being assigned to said job. Once an employee returns to his original classification as aforesaid, or remains in his selected job more than fourteen (14) days, all of his "bumping" rights shall be ended. Any vacancy which occurs as the result of the return by an employee to his original job within fourteen (14) working days shall be filled in accordance with the terms and conditions of the collective bargaining agreement between the defendants now in effect.

10. The Company may remove an individual from a position should that individual fail to demonstrate that he is capable of performing the duties of his selected job; provided, however, that in no case may the Company utilize standards more stringent than standards presently utilized.

11. Displaced employees: In the event that any incumbent employee is displaced as a result of the "bumping" relief provided for herein and has had to move to a job having a lower rate, such employee shall have his or her wages "red-circled" (a) until the wage level for the job to which the employee has been moved reaches the level at which he was formerly being paid, or (b) until the employee voluntarily moves to a job with a rate lower than the job to which he was displaced, or (c) until the employee moves to a job with a rate equal to or higher than the red-circled rate, or (d) until such time as the employee fails to avail himself of the opportunity to move to a job with a rate higher than the job to which he was displaced; provided, however, that under sub-paragraph 11(d), no displaced employee shall be required to move more than once in each six-month period to a job with an hourly rate higher than the job to which he was displaced, nor shall he be required to move to a job with an hourly rate which is less than five (5) cents per hour above the rate of the job to which he was displaced or which he is occupying at the time.

12. During the canvass provided for in Section II, black employees and white female employees at the Richmond Branch or the Virginia Branch who qualify for "bumping" rights under the provisions of Section II, 7, and who desire to transfer to the other Branch, shall have the right to do so on the basis of their seniority.

II-A *Company-wide Seniority and Transfer Rights of Currently Employed Class I and Class II Members*

After the completion of the procedure outlined in Section II, 5, or, until all Class I and Class II members who

indicate their desire to transfer to another Branch have had an opportunity to do so, in accordance with the procedures outlined herein, the following Company-wide seniority and transfer rights shall be in effect:

1. A Class I or Class II member must indicate such desire on the form attached hereto as Exhibit B within thirty (30) days after the completion of the procedure outlined in Section II, 7.

2. A vacancy shall be as defined in the current collective bargaining agreement between the Company and the Union defendants.

3. Notice of a vacancy shall be posted in conspicuous places at both Branches. All members of Class I and Class II who have indicated their desire to transfer shall be given the opportunity to bid on the job posted.

4. Should such Class I or Class II member be the most senior bidder in terms of Company-wide seniority, he shall be entitled to fill the vacancy.

5. Should such Class I or Class II member transfer, he will carry with him the Company-wide seniority which will be used for all purposes, including promotion or demotion.

6. Should such Class I or Class II member twice refuse an opportunity to transfer to a vacancy for which he is the senior bidder, he thereupon will lose his right to transfer from one Branch to the other.

III. *Supervisory Personnel*

The Company is enjoined from implementing, maintaining or giving effect to any criteria utilized for the selection of supervisory personnel which is designed to or has the effect of discriminating against black or female candidates for supervisory positions.

The Company is ordered to formulate objective criteria for the promotion or selection of supervisory personnel. Job descriptions and selection criteria for supervisory positions shall be formulated in accordance with the procedure set forth in Section II, 5, herein.

Vacancies in assistant foreman and foreman positions at the Richmond Branch and Virginia Branch and vacancies in the Office Supervisor positions at the Richmond Office shall be filled with blacks and females, except when the Company is unable to hire a qualified black or female, until, (1) the percentage of blacks in supervisory positions approximately equals the percentage of blacks in the Richmond, Virginia, SMSA work force, and (2) the percentage of females in supervisory positions approximately equals the percentage of females in the Richmond, Virginia, SMSA work force. The Company is not required to fill any such position with any person not qualified for it nor is it required to retain any person in any such position if, after a reasonable time, he is unable to perform competently the duties of such position. The decision as aforesaid is that of the Company and will not be disturbed absent a showing of race or sex discrimination.

IV. *Crafts*

For the reasons stated in the Memorandum Opinion, relief with respect to the hiring, training, or promotion of employees for craft positions at the Richmond and Virginia Branches is denied.

V. *Testing*

The screening tests used by the Company in the selection of employees to fill the position of "electronics adjustor" have had no discriminatory effect on blacks or females.

VI. *Hiring*

For the reasons stated in the Memorandum Opinion, relief with respect to the hiring of hourly paid production workers is denied.

VII. *Back Pay*

1. Hourly-paid[5] blacks who were employees of the defendant Company on or after July 2, 1965, whether currently employed or not, and (2) hourly-paid[5] females whether currently employed or not who were employees of the Company on or after July 2, 1965; shall be entitled to recover back pay from the defendants in an amount to be fixed by subsequent order of this Court and for the period beginning in January, 1967, for Class I employees and April, 1967, for Class II employees.

VIII. *Pension and Profit-Sharing Plans*

(1) Hourly-paid blacks who were employees of the defendant Company on or after July 2, 1965, whether currently employed or not; and (2) hourly-paid females who were employees of the Company on or after July 2, 1965, whether currently employed or not; shall be entitled to recover from the defendants compensation and adjustments to the pension and profit-sharing plans to recoup benefits lost as a result of the effects of past discrimination, in an amount to be fixed by subsequent order of this Court and for the same period as provided for back pay above.

IX. *Collective Bargaining Agreements*

The collective bargaining agreement now in effect and all subsequent collective bargaining agreements shall re-

[5] Craft employees in jobs which are not covered by the collective bargaining agreement between American and Local 182 are excluded from this definition.

main in, and continue to have, full force and effect, except insofar as such agreements are inconsistent with the provisions of this Decree. Should a conflict arise between the provisions of the collective bargaining agreement and the provisions of this Decree, the terms of this Decree shall prevail.

X. *Notice*

The defendants shall give notice of this Decree to all Company employees and Union members affected thereby, by posting for a period of sixty (60) days copies of this Decree on bulletin boards, located in conspicuous places at its Richmond and Virginia Branches, the Richmond Office, and the Union facilities.

XI. *Cost and Attorneys' Fees*

Plaintiffs are awarded their costs and expenses to be taxed against the defendants. Plaintiffs in *Patterson* are entitled to recover reasonable attorneys' fees and expenses as a part of their cost of this action.

XII. *Reporting Procedure*

1. The defendants shall make bi-annual reports to this Court, the first report being due on March 15, 1975, with copies sent to counsel for plaintiffs, which shall contain:

A. Supervisory positions: (1) a listing of all supervisory vacancies, by title, department, and facility, which have occurred since the last report; (2) the name, race, sex, Company seniority date (or date of hire) of the employee selected for the position; (3) current rosters showing the name, race, sex, job title, and department for the supervisory personnel at each facility; (4) the name, race, sex,

job title, department, and facility of each black or female supervisory employee terminated or demoted during the reporting period, and the reason for the termination or demotion (e.g., dismissal, retirement, etc.).

B. T.W.I.U. bargaining unit positions: (1) a listing of all job vacancies, by job title, department, and facility which have occurred since the last report; (2) the name, race, sex, Company seniority date, job classification, department, and facility of each employee who bid on the vacant job; (3) the name, employee identification number, race, sex, Company seniority date, job classification, department, and facility of the employee awarded the job; (4) the name, race, sex, Company seniority date, job classification, department, and facility of every black or female employee who was demoted, laid off, or terminated during the last reporting period and the reason for the action.

C. Such reports shall be submitted until March 15, 1976; a similar report shall be submitted on March 15, 1977, after which time the Court shall divest itself of jurisdiction over this matter unless, prior to that date, on application of any party, jurisdiction is extended.

2. No later than thirty (30) days after the selection of the jobs in the Richmond and Virginia Branches required by Section II, *supra*, the defendants shall submit to this Court, with copies to counsel for plaintiffs, the following:

A. The name, race, sex, employee identification number, Company seniority date, wage rate, prior and current job classification, department, and facility of each employee who is displaced as a result of the procedure set forth in Section II, *supra*.

B. The name, employee identification number, race, sex,

Company seniority date, job classification, and facility of each member of Class I and Class II who has (1) elected not to bid on any position; (2) bid and moved to another position (or positions), including the title of the new position(s); (3) bid on a position which he was not awarded because of insufficient seniority; or (4) executed a copy of the form attached hereto as Exhibit B. [See attached sheet.]

C. All personnel records, union membership lists, bid sheets, seniority rosters, and other data used in preparing the reports required by this Section, shall be maintained by the defendants at their usual places of business and shall, upon reasonable notice, be made available to counsel for plaintiffs for inspection or copying, together with any other data necessary to evaluate the performance of the defendants under this Decree. Such records shall be maintained and preserved for the duration of this Decree.

/s/
United States District Judge

Alexandria, Virginia
December 31st, 1974

EXHIBIT A

WAIVER OF JOB SELECTION OPPORTUNITY

I hereby acknowledge that the American Tobacco Company has given me the opportunity to select any job to which my seniority would entitle me at the Richmond and Virginia Branches in accordance with the Decree entered on ..... in the cases of *John Patterson, et al.*, v. *The American Tobacco Co., et al., and Equal Employment Opportunity Commission* v. *American Brands, Inc., et al.* I have elected not to exercise such opportunity and hereby waive the right of selection given by the said Decree.

.....

Employee

Witness: .....

Dated: .....

EXHIBIT B

REQUEST FOR OPPORTUNITY TO TRANSFER

I hereby request that I be given the opportunity to transfer from the Richmond/Virginia Branch of the American Tobacco Company to the Richmond/Virginia Branch should a vacancy occur at said Branch for which I am the most senior bidder pursuant to the Decree entered on ....., in the cases of *John Patterson, et al.* v. *The American Tobacco Company, et al.*, and *Equal Employment Opportunity Commission* v. *American Brands, Inc., et al.*

.....

Employee

Dated: .....

Company Acknowledgement: .....

Opinion of the Court of Appeals on Initial Appeal ("Patterson I")

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1259

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated,

Appellees,

—v—

THE AMERICAN TOBACCO COMPANY, a Division of American Brands, Incorporated,

Appellant.

No. 75-1260

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated,

Appellees,

—v—

Tobacco Workers' International Union, an unincorporated association; Local 182, Tobacco Workers' International Union, an unincorporated association,

Appellants.

Opinion of the Court of Appeals on Initial Appeal ("Patterson I")

No. 75-1261

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated,

Appellants,

—v—

THE AMERICAN TOBACCO COMPANY, a Division of American Brands, Incorporated; Tobacco Workers' International Union, an unincorporated association; Local 182, Tobacco Workers' International Union, an unincorporated association,

Appellees.

No. 75-1262

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellee,

—v—

Local 182, Tobacco Workers' International Union (AFL-CIO),

Appellant.

No. 75-1263

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellee,

—v—

AMERICAN BRANDS, INC., d/b/a American Tobacco Company, Inc.,

Appellant.

Opinion of the Court of Appeals on Initial Appeal ("Patterson I")

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Albert V. Bryan, Jr., District Judge.

Argued May 7, 1975. Decided Feb. 23, 1976

Before WINTER, BUTZNER, and WIDENER, Circuit Judges.

Henry L. Marsh, III; (S. W. Tucker; John W. Scott, Jr.; Randall G. Johnson; Hill, Tucker and Marsh; Jack Greenberg; Elaine R. Jones; Barry L. Goldstein; and Morris J. Baller on brief) for John Patterson, et al.; Henry T. Wickham (John F. Kay, Jr.; Kenneth V. Farino; Mays, Valentine, Davenport and Moore; Chadbourne, Parke, Whiteside and Wolff; Paul G. Pennoyer, Jr.; Arnold Henson; Bernard W. McCarthy; and Bernard J. Dushman on brief) for The American Tobacco Company and American Brands, Incorporated; Herbert L. Segal (Irwin H. Cutler, Jr.; Walter Lapp Sales; Segal, Isenberg, Sales and Stewart; Jay J. Levit; Stallard and Levit; and James F. Carroll on brief for Tobacco Workers' International Union and Local 182); Margaret C. Poles, Attorney, Equal Employment Opportunity Commission, (Julia P. Cooper, General Counsel; Joseph T. Eddins, Associate General Counsel; and Beatrice Rosenberg and Charles L. Reischel, Attorneys, on brief) for the Equal Employment Opportunity Commission.

BUTZNER, Circuit Judge:

These appeals and cross appeals question certain provisions of a judgment entered in consolidated actions brought by the Equal Employment Opportunity Commis-

sion and several black employees of the American Tobacco Co. against the company, the Tobacco Workers International Union, and its Local 182. The case concerns the application of Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.] and 42 U.S.C. § 1981 to redress race and sex discrimination in working conditions.[1] Following is a summary of the district court's decision and our disposition of the assignments of error:

I. The district court defined the class of black employees as those, whether currently employed or not, who worked on or after July 2, 1965, the date Title VII became effective. It found no discrimination in hiring but ruled that the company and the labor organizations had engaged in unlawful employment practices by racial discrimination in the promotion of employees. It ordered American to institute company-wide seniority, eliminate certain lines of progression from lower to higher paying jobs, post definite job descriptions, grant back pay, and adjust pensions and profit sharing plans in amounts to be determined at a subsequent hearing. The court also ordered that white incumbents be bumped from jobs for which senior black employees were qualified.

Neither party has assigned error to the court's finding of no discrimination in hiring. We find no error in the designation of the class. We affirm the finding of discrimination in promotions and approve the relief ordered by the court, except for provisions of the judgment dealing with company-wide seniority and bumping.

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[1] 42 U.S.C. § 2000e2 [*sic*] prohibits both employers and labor organizations from engaging in employment practices that discriminate on the basis of race or sex.

42 U.S.C. § 1981 assures all persons the same right to make and enforce contracts as is enjoyed by white citizens.

II. The district court ruled that the EEOC was empowered to bring suit to eliminate discrimination against women, although the initial charge dealt only with discrimination against men. It defined the class of aggrieved women in terms similar to those used to describe the class of black employees. The court found discrimination in promotions but not in hiring, and it ordered relief similar to that afforded black employees.

On these issues we affirm the district court, modifying only its grant of relief.

III. The district court found discrimination in the selection of supervisors and ordered the company to prepare written job descriptions and objective criteria for appointments. It also ordered preferential hiring of blacks and women to fill supervisory vacancies.

We affirm these aspects of the court's judgment except for those dealing with preferential hiring.

IV. The district court held that the actions were timely filed, that the statute of limitations for an action brought under § 1981 is five years, and that the statute is not tolled by filing a charge with the EEOC. It also held that back pay for discrimination against women should accrue from two years before the charge was filed.

Except for the application of the five-year statute of limitations and the accrual of liability for the women's back pay, we affirm these rulings. The proper limitation, we hold, is two years, and the accrual date for back pay must be reexamined in light of EEOC v. General Electric Co., —— F.2d ——, No. 74-1974 (4th Cir. 1975), which was decided after the district court wrote its opinion.

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I

American operates three facilities in Richmond, Virginia. The "Virginia Branch" makes cigarettes; the "Richmond Branch" makes pipe tobacco; and the "Richmond Office" keeps accounts and records for both branches. Approximately 250 of the 1,280 employees at both branches are black, and in the Richmond office 13 of the 62 employees are black. In each branch the prefabrication department blends and prepares tobacco before sending it to the fabrication department, which manufactures the finished products. Workers in prefabrication generally earn less than those in fabrication, and most employees at the Richmond branch make less than those at the Virginia branch.

Before 1963 the union and the company overtly segregated employees by race with respect to job assignments, cafeterias, restrooms, lockers, and plant entrances. White employees were represented by Local 182 of the Tobacco Workers International Union, while black employees were represented by Local 216. Blacks were generally assigned to positions in the prefabrication departments. The higher paying jobs in fabrication were largely reserved for white employees. Each department had its own seniority roster, on which promotions depended. Employees could not transfer from one department to another without forfeiting their seniority.

In September 1963 the black union was assimilated by the white Local 182 to comply with an executive order relating to the government's purchase of supplies. Simultaneously, the company abolished departmental seniority, but it continued to maintain separate rosters at the two branches. The 1963 changes did not eliminate racial discrimination from the company's promotion practices. The

district court found that until 1968 the company utilized a system of unwritten qualifications which denied black employees access to the higher paying jobs at the Virginia branch. For certain positions an employee had to be familiar with the duties of the new job in the opinion of his supervisor. Also, he had to work a minimum number of hours on a temporary basis to qualify as an operator of a making or packing machine. Consequently, black employees not working in proximity to the higher paying jobs had limited opportunity to qualify, regardless of their seniority. Combined with static employment in the tobacco industry, this system allowed little advancement of black employees from jobs in prefabrication to those in fabrication. Indeed, from 1963 to 1968 there was an increase of only four blacks in the fabrication department at the Virginia branch.

The Richmond branch had no qualification restrictions on promotions. Instead, supervisors canvassed employees, seeking the senior worker willing to fill a vacancy. There were, however, no written job descriptions. This system provided slight opportunity for black employees to move from prefabrication to fabrication, and from 1963 to 1968, there was an increase of only six black employees in the latter department. As of 1968, only three of the 26 machine operators were black.

In January 1968 the company discontinued its qualifications system. Instead, it posted vacancies and promoted the senior employee who bid for the job. The district court found that this innovation was "facially fair and neutral" but ordered that it be implemented by posting written job descriptions. Furthermore, the district court found that access to certain jobs was barred to black em-

ployees by lines of progression and the maintenance of separate seniority rosters for each branch.

Although the company and the union have taken steps in recent years to correct some of the inequalities of the past, the lines of progression, the lack of definite written job descriptions, and barriers to transfer between the branches remain impediments to fair and neutral employment practices. Much must still be done to eradicate any taint of racial discrimination at the plant. The most recent figures available indicate that as of the end of 1973, more than 80 percent of all the employees in the Virginia branch's prefabrication department were black, while in the fabrication department only about 14 percent were black. At the Richmond branch, black employees' penetration into the fabrication department was greater, with blacks comprising more than 38 percent of the workforce. But the lower paying prefabrication department remained almost completely segregated; 92 percent of its employees were black. These figures provide ample support for the district court's findings that "[t]raditionally, at both branches there have been more blacks in the prefabrication department than whites, and more whites in the fabrication department than blacks."

The company emphasizes that from July 2, 1964, to March 1, 1974, 25 percent of all employees promoted and 20 percent of those advanced to operate automatic machinery at the Virginia branch were black. Also, since the initiation in January 1968 of the posting and bidding procedure, 51.5 percent of the successful bidders have been black. These gross figures, however, include promotions in both prefabrication and fabrication departments, and, while laudable, they do not address the crucial issue of the case —the entry of black employees into the historically white

fabrication department. Apart from the fact that many of these promotions were made after charges were filed with the EEOC, the company's reliance on the overall promotion rate in both departments misses the mark because blacks have always been promoted in the historically black prefabrication department. Moreover, as late as 1973, of the approximately 200 hourly-paid, non-craft job classifications at Virginia, 18 had never been held by whites and 10 had never been held by blacks. Even more rigid segregation characterized the Richmond branch; of the approximately 43 hourly-paid, non-craft job classifications, 21 had never been held by whites and nine had never been held by blacks.

We conclude, therefore, that the record amply supports the district court's finding that after the effective date of Title VII the company and the union discriminated in the promotional policies of their bargaining agreements and practices. Tested by familiar standards, the court's findings must be sustained.[2]

We next consider the assignments of error that challenge the relief ordered by the district court. The directive that definite job descriptions must be provided in order to implement a fair method of promotion was clearly warranted. *Cf.* Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972).

In those jobs that were filled according to lines of progression, an employee had to work in the first job before proceeding to the next, and so on up to the highest job in the line. Most of these jobs were in the fabrication departments. Since black employees had been largely ex-

[2] Federal Rule of Civil Procedure 52(a) provides in part that "[f]indings of fact [by the court] shall not be set aside unless clearly erroneous . . ."

cluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority. In this respect, the lines of progression perpetuated the effects of past discrimination in a manner similar to the formerly segregated departmental seniority rosters. On the basis of its evaluation of conflicting expert testimony, the district court held that only three of the nine lines are justified by business necessity.[8] For the others, alternative means such as on-the-job training are available to provide competent workers.

Addressing the discrimination caused by lines of progression, we pointed out in Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971), that the vagaries of chance inherent in this promotion system might bar a qualified worker from advancement for years, although he could learn to perform the job competently in a relatively short time. To deal with such situations, we formulated the following standard for ascertaining whether a condition of employment was justified by business necessity:

> "[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." 444 F.2d at 798.

[8] The three positions for which lines of progression can be maintained are adjuster, overhaul adjuster and adjuster prefabrication.

Measured by this test, the district court's elimination of the six lines of progression was correct.

The district court also ordered a single seniority roster for the Virginia and Richmond branches to enable employees in each branch to bid for posted jobs in the other. The order is designed to correct the present effect of past discrimination, which denied black employees entry into the higher paying jobs of the fabrication departments, particularly at the Virginia branch. For example, under the present method of job assignments, a black employee hired in 1955 at the Richmond branch prefabrication department has no realistic opportunity to secure a higher paying job in the formerly white Virginia fabrication department because he cannot transfer his company seniority to the Virginia branch. If he seeks a new job there, he must forfeit his seniority and start as a new hire.

The district court correctly found that the denial of transfer between the branches without retention of company seniority perpetuates the effect of past discrimination. We believe, however, that the relief ordered by the district judge is broader than necessary. Title VII does not require the company or the union to forego the benefits of separate, nondiscriminatory seniority rosters. "Application of the Act normally involves two steps. First, identification of the employees who are victims of discrimination, and second, prescription of a remedy to correct the violation disclosed by the first step. The Act does not require the application of the remedy to employees who are not subject to discrimination." United States v. Chesapeake and Ohio Ry., 471 F.2d 582, 593 (4th Cir. 1972). The only employees who suffered discrimination were blacks who could not obtain jobs in the fabrication departments because of their

race. Consequently, they are the only employees who should be allowed to transfer under the posting and bidding system from one branch to the fabrication department in the other branch on the basis of their company seniority. Black employees need not be allowed to transfer with company seniority to jobs in prefabrication, because they were never barred from these jobs in the first place. Similarly, white employees seeking transfers are not entitled to utilize company seniority, because they were never barred from fabrication departments. Finally, no employee hired after the cessation of discrimination in job assignments need be allowed to transfer with seniority intact. *See, e.g.,* Russell v. American Tobacco Company, —— F.2d ——, No. 74-1650 (4th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968).

The company and the union assert that this case is distinguishable from departmental seniority cases like *Robinson* because the Richmond and Virginia branches are in different locations. They emphasize that the branches make different products, have different managements, hire separately, and are some distance apart. For these reasons, they argue, the case falls within 42 U.S.C. § 2000e-2(h), which provides that:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ."

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Noting that neither the Act nor the regulations define the statutory term "employees who work in different locations," we recently construed § 2000e-2(h) in Russell v. American Tobacco Co., —— F.2d ——, No. 74-1650 (4th Cir. 1975). We pointed out that the labor market is the most important factor in determining whether a company's employees work in different locations. A company operating two or more of its plants with employees who are from the same geographic area and who are unskilled or possess the same skills can assign an applicant to an entry level position in either plant. Therefore, employees the company hired from the same labor market would not generally fall within the statutory class of "employees who work in different locations."

On the other hand, even though a company's plants are in the same city, as they are here, their proximity does not conclusively show that they are in the same location. If one plant requires labor possessing skills different from those of workers at another plant, the company cannot draw from the same labor market to man its plants. Under these circumstances, employees would work at different locations, even though they reside and work in the same geographic area.

American hires employees for both branches from the same labor market. The branches are only a few city blocks apart. There are entry level jobs at both places that require neither particular skills nor experience, and jobs in fabrication can be filled just as well by transferees as by persons hired off the street.

Other facts support the district court's finding that these plants are not in different locations. The same bargaining agreement covers employees at both plants, and the

company has contractually reserved the right to shift employees from one plant to the other without depriving them of seniority. The Richmond office, located in a building at the Virginia branch, serves both branches, and the Virginia branch ships the Richmond branch's products.

There is another reason why the exemption granted in § 2000e-2(h) is not available to American. As we noted in *Russell, supra,* slip op. at 10, that section contains a proviso that restricts its application to situations where differences in the conditions of employment "are not the result of an intention to discriminate." Past intentional segregation that is perpetuated by a company's seniority system precludes it from claiming that its system is bona fide within the meaning of § 2000e-2(h), Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). Similarly, "where present differences in working conditions are remnants of past intentional discrimination, the proviso of § 2000e-2(h) bars a company from defending its employment practices on the ground that its employees work in different locations." Russell v. American Tobacco Co., —— F.2d ——, ——, No. 74-1650 (4th Cir. 1975), slip op. at 11.

We therefore affirm the district court on this issue but note that on remand it should vacate the provision of its judgment requiring a single seniority roster for both branches. It should substitute an order allowing those black employees who formerly could not obtain jobs in the fabrication departments because of discrimination to utilize their company seniority to bid for such jobs in the fabrication department of either branch. Of course, an employee who transfers must have the capacity to perform the job after receiving a reasonable amount of training.

The company and the union also assign error to the

part of the district court's order that allowed senior black and female employees to bump junior employees from preferred jobs. The court ordered immediate company-wide posting and bidding on each non-supervisory job in the Richmond and Virginia branches. The only qualifications for advancement were to be seniority and a willingness to learn the job. To facilitate the bidding, the court ordered that job descriptions be posted. It further provided that employees who were displaced by senior black or female workers, and therefore had to move to lower paying jobs, must be paid as much as they were in their former jobs. The court explained the reason for this provision of its decree as follows:

> "The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further implementation. As indicated in the findings of fact, however, black and female employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring." (Appendix at 37-38.)

The court's description of the lack of employment opportunities is well supported by the evidence. No new employees were hired to fill jobs under jurisdiction of the union from September 12, 1955, through June 12, 1964, in the Richmond branch and May 12, 1966, in the Virginia branch. Employment in both branches decreased from 1953 to 1973 by approximately 1300 workers.

One of the early questions about the construction of

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Title VII was whether "present consequences of past discrimination [are] covered by the act." Quarles v. Philip Morris, Inc., 279 F.Supp. 505, 510 (E.D. Va. 1968). The generally accepted answer is a qualified "yes": employers and unions using pre-Act discriminatory practices to bar employees from filling post-Act vacancies violate the Act. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); *Quarles, supra.* On the other hand, Title VII has not been construed to impose a duty to demote incumbents. In Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), the court rejected the contention that "allowing junior whites to continue in their jobs constitutes an act of discrimination." Judge Wisdom, writing for the court, said:

> "The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that 'locks in' prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation." 416 F.2d at 988.

Every appellate court to whom the issue has been presented has accepted this interpretation.[4] Equally important, when Congress was considering the 1972 amendments to Title VII, it approvingly noted *Papermakers'* construction of the Act.[5]

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[4] *E.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); United States v. N. L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Chesapeake & Ohio Ry., 471 F.2d 582 (4th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

[5] The section-by-section analysis of the House bill states that "it was assumed that the present case law as developed by the courts

These precedents cannot be satisfactorily distinguished on the ground that bumping would be required only when the proof discloses a static industry that has few vacancies. The difference between static and dynamic industries is not always readily ascertainable because employment opportunities fluctuate for many reasons over long and short periods. Requiring bumping for static industries while denying it in dynamic industries would introduce into the administration of the Act countless variables for which Congress has made no provision.

Since the Act should not be applied retroactively,[6] it is, of course, much easier to justify the retention of incumbents who obtained their positions before the effective date of the Act than the retention of those who were unlawfully preferred after this date. Nevertheless, neither Congress nor the EEOC nor the courts have drawn a distinction between pre-Act and post-Act incumbents. The reasons for applying the Act uniformly are largely pragmatic. The enactment of Title VII was the result of many concessions, including the unequivocal assertion by proponents of the legislation that it was not intended to be used to displace incumbent workers.[7] A primary goal of Title VII is to

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would continue to govern the applicability and construction of Title VII." Legislative History of Equal Employment Opportunity Act of 1972, Government Printing Office (1972) at 1844. *Papermakers*, of course, was a prominent part of that case law.

[6] This principle is established by the legislative history. Senators Clark and Case, two of the bill's sponsors, circulated an interpretative memorandum stating that Title VII's operation was "prospective and not retrospective . . . (T)he employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis." 110 Cong. Rec. 6992 (daily ed. April 8, 1964), quoted in Quarles v. Philip Morris, Inc., 279 F.Supp. 505, 516 (E.D. Va. 1968).

[7] The Clark-Case memorandum, note 6 *supra*, states that an employer "would not be obliged—or, indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies,

induce voluntary compliance by employers and unions. Section 2000e-5; *see* EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 948 (8th Cir. 1974). Demoting employees, especially those who are not responsible for wrongdoing, undoubtedly would encounter more resistance than deferring their future expectancies. As this case illustrates, bumping is an unsettling process. Its domino effect adversely affects employees who have done no wrong and who, indeed, may have been the victims of discrimination.[8]

The effects of bumping are exacerbated by another aspect of Title VII. The Act does not provide a definitive catalogue of unlawful employment practices. Congress placed this responsibility on the EEOC and, ultimately, the courts. It soon became obvious that overt discrimination is not the only obstacle to equal employment opportunity.[9] As a result of litigation, many "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" have been exposed as discriminatory and condemned. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); United States v. Dillon Supply Co., 429

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or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier." 110 Cong. Rec. 6992 (daily ed. April 8, 1964).

[8] As part of its compliance with the district court's decree, American conducted a canvass of its employees to determine the effect of bumping. The results of that survey are contained in a report filed with this court to supplement the record. The report showed that 40 employees requested jobs to which their plant-wide seniority would entitle them. One of these has already obtained the job he requested. The others would bump eight white male employees and 31 minority employees out of the jobs they now occupy. We stayed the provision of the decree that required bumping pending this appeal.

[9] *See generally* Introduction, The Second Decade of Title VII: Refinement of the Remedies, 16 Wm. & Mary L. Rev. 433, 436-37 (1975).

F.2d 800, 804 (4th Cir. 1970). There is no reason to suppose that this process will soon abate. Bumping could mean that employers and workers would likely have their businesses and their working lives rearranged by court decrees from time to time, as various unlawful employment practices are identified. *See generally* Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260, 1274-75 (1967).

Finally, although Congress did not intend the Act to be used as a vehicle for displacing incumbents, it did not leave the victims of discrimination without a remedy. Section 2000e-5(g) expressly authorizes a district court to award them back pay. While an employee who has been unlawfully denied a promotion must await a vacancy before advancing, he need not prove that a vacancy exists in order to qualify for back pay. Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 408 (1975), the Court explained the standards a district court should follow in awarding back pay to employees who "have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice." The Court said that the back pay provision must be applied in a manner that is "consonant with the twin statutory objectives" of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421.

To satisfy these objectives, back pay must be allowed an employee from the time he is unlawfully denied a promotion, subject to the applicable statute of limitations, until he actually receives it. Some employees who have been victims of discrimination will be unable to move im-

mediately into jobs to which their seniority and ability entitle them. The back pay award should be fashioned to compensate them until they can obtain a job commensurate with their status. This may be accomplished by allowing back pay for a period commencing at the time the employee was unlawfully denied a position until the date of judgment, subject to the applicable statute of limitations. This compensation should be supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position. *See* Bush v. Lone Star Steel Co., 373 F.Supp. 526, 538 (E.D. Tex. 1974); United States v. United States Steel Corp., 371 F.Supp. 1045, 1060 n. 38 (N.D. Ala. 1973).[10] Alternatively, the court may exercise continuing jurisdiction over the case and make periodic back pay awards until the workers are promoted to the jobs their seniority and qualifications merit. Or perhaps counsel and the court can devise some other convenient method of taking all the effects of past discrimination into account. In any event, the compensation must include, as the district court properly noted, increments for pensions and profit sharing.

Compensatory pay and adjustment of benefits provide monetary relief for discrimination against minority employees but do not afford the satisfaction that comes from being promoted to a more responsible job. Nevertheless, such an intangible benefit does not justify injunctive relief

[10] This measure of compensation is analogous to that awarded in an ordinary tort case, where compensation is assessed for one's loss of earnings whether the loss occurs before or after the judgment is entered. The analogy is apt because a statutory action attacking racial discrimination is fundamentally for the redress of a tort. *See* Curtis v. Loether, 415 U.S. 189, 195 (1974).

mandating bumping. Weighed against a minority employee's sense of achievement are the harm that demotion will cause to incumbents who have done no wrong and the disruption of the company's business that bumping entails. The survey of employees referred to in footnote 8, *supra*, indicates that 39 minority employees are seeking jobs held by 8 white men and 31 other minority employees. This survey, however, does not prove that the employees seeking different jobs were motivated even in part by non-monetary factors, for it was conducted on the assumption that bumping was the only way they could receive better pay and fringe benefits. Since full monetary compensation and the removal of barriers to promotion provide adequate relief to minority employees without disruption to other employees and management, we conclude that neither Title VII nor its legislative history requires bumping in this case.

Relief under § 1981 is limited to correcting racial discrimination. *See* Delavigne v. Delavigne, No. 75-2203, —— F.2d —— (4th Cir. 1976); Willingham v. Macon Telegraph Publishing Co., 482 F.2d 535, 537 n. 1 (5th Cir. 1973). But apart from this, Title VII and § 1981 provide complementary remedies for employment discrimination, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975). Although the legislative history of Title VII cannot support a decision that bumping relief is unavailable under § 1981, the pragmatic considerations we advance apply with equal force to the § 1981 claim. Moreover, "in fashioning a substantive body of law under § 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction." Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309, 1316 (7th Cir.

1974). For these reasons, we hold that bumping relief is not available to American's black employees under § 1981.

On remand, therefore, the district court should modify its decree to eliminate bumping, but it should take steps to assure that back pay will be computed to include compensation for the entire time that a minority employee is denied a promotion for which he or she is qualified by seniority and ability.

We affirm the district court's award of relief against both the local and the International, except as noted in Part II. The local acquiesced without protest in the lines of progression. Not until 1968 did it negotiate for the removal of the qualification requirements for promotion. In 1968, 1971, and 1974, it proposed a company-wide seniority system that would have allowed transfers between branches. When the company declined, the union settled for assurances of indemnity that would protect its treasury against the claims of its members.

A union may not bargain away minority employees' rights to equal treatment, *see* Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971), and, indeed, it must "negotiate actively for nondiscriminatory treatment" of its minority workers. Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 989 (D.C. Cir. 1973); *see also* United States v. N. L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973). The Supreme Court has recently emphasized the duty a union owes to its minority members by pointing out that one of the purposes of a back pay award is to spur unions, as well as employers, to evaluate employment practices and eliminate unlawful discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). Tested by these principles, the district court's imposition of liability

on both the local and the International was warranted by the law and the facts.

Nor can we accept the International's argument that it should not be held liable because it was not responsible for the contracts negotiated by the local. The evidence disclosed that a vice president of the International acted as an "advisor" to the local, playing an active role as the president's deputy in the 1971 and 1974 negotiations for bargaining agreements. Moreover, the constitution of the International provides:

> "It shall be the principal duty of the Local Union to secure satisfactory collective bargaining and working agreements showing an adequate minimum wage and fair working conditions for workers who have become affiliated with the TWIU, provided, however, that no collective bargaining and working agreement shall be consummated until first submitted to the general president who may approve or reject any proposed agreement, and no such agreement can be executed without the approval of the general president or his deputy."

The district court was not obliged to accept representations of the vice president that contradicted the plain meaning of this provision. The court properly concluded that the International's approval of the bargaining agreement pursuant to this provision made it jointly responsible with the local. Cases dealing with an international union's exoneration of liability to an employer are inapposite where its duties to members of its local unions are at issue.

II

The EEOC's complaint contains allegations of discrimination against women employees. The company contends

that the commission lacked authority to press this claim because no female employee filed a charge. On the contrary, the company points out, the only charge of sex discrimination was filed by a male employee. The district court overruled the company's motion to dismiss this aspect of the case, holding that the commission could institute the suit if its investigation of the male employee's complaint disclosed discrimination against women.

We affirm the district court. We recently decided this issue adversely to the company's position in EEOC v. General Electric Co., —— F.2d ——, No. 74-1974 (4th Cir. 1975). The company's argument does not persuade us to depart from the conclusions reached in that case.[11]

On the merits of the claim of sex discrimination, we uphold the district court's finding of liability. Because the company's discrimination against women bears many similarities to its discrimination against black employees, we need not recite the evidence in detail. It is sufficient to note that for many years the company overtly segregated jobs by sex, discriminating against women, as the district court found, "with respect to wage structure, departments, seniority and hiring." Even after these practices were nominally eliminated in 1963, their discriminatory effect was perpetuated by lack of definite job descriptions, lines of progression, and obstacles to transfers. The court found that as recently as 1973, 23 of the approximately 200 non-craft, hourly-paid jobs at the Virginia branch had not been held by women, and six had not been held by men. At the Richmond branch, 32 of the 43 non-craft, hourly-paid jobs had not been held by women, and six had not been held by men. The company has not demonstrated that these segre-

[11] *See* Part IV *infra* for a discussion of the statute of limitations with respect to this issue.

gated positions cannot be filled by persons of the opposite sex. The court also found that from 1967 through 1972 women had a lower mean income than men with comparable seniority.

Again, the district court's findings are supported by the evidence and cannot be set aside as clearly erroneous. The relief the court afforded women is essentially the same as the relief it granted black employees. Accordingly, we approve the relief for women employees, subject, however, to the same modifications of the court's decree that we mentioned in Part I. This relief, however, can be granted only against the company. The complaint against the union for sex discrimination must be dismissed for reasons we will next discuss.

The commission's complaint names the company and Local 182 as defendants. The commission acknowledged that it had not attempted to conciliate the charges with the union before filing suit. While the suit was pending, it made an offer to conciliate, which the union accepted. In the course of discussion with the union, however, the commission's representative conceded that he had no authority to settle the suit. Understandably, the conciliation efforts were unsuccessful. The district court, viewing the lapse as technical, held that the belated offer to conciliate and its acceptance substantially complied with the Act.

The Act requires, however, that after receiving a charge and before bringing a suit the commission must take four steps: serve the charge on the employer and labor organization, investigate the charge, determine that reasonable cause exists to believe the charge is true, and endeavor to eliminate alleged unlawful employment practices "by informal methods of conference, conciliation, and persua-

sion."[13] The 1972 amendments to Title VII empowered the commission to sue if it is unable to secure an acceptable conciliation agreement.[13] This provision of the Act has been construed to create an express condition on the commission's power to sue. Consequently, a suit brought by the commission before attempting conciliation is premature. EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 947-48 (8th Cir. 1974); EEOC v. E. I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1333-34 (D. Del. 1974); EEOC v. Westvaco Corp., 372 F.Supp. 985, 991-93 (D. Md. 1974).[14]

We recently emphasized that the commission's statutory duty to attempt conciliation is among its most essential functions.[15] It is particularly important for the commission to attempt conciliation with a union when investigation discloses that provisions of a bargaining agreement concerning seniority and job assignments are causing the alleged unfair employment practices. Then the employees who enjoy majority status are frequently more directly affected than their employer by changes that will advance minority employees. In such cases, the success of conciliation often hinges on the union's response.

We do not rule out the possibility that exceptional circumstances may excuse a failure to attempt conciliation, but

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[13] 42 U.S.C. § 2000e-5(b).

[13] 42 U.S.C. § 2000e-5(f)(1).

[14] We have held that the commission's failure to attempt conciliation is not a jurisdictional bar to an employee's action, because the employee cannot be charged with the commission's failure to execute its statutory duties. Russell v. American Tobacco Co., —— F.2d ——, ——, No. 74-1650 (4th Cir. 1975); Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968). These cases, however, are inapposite where the commission's power to sue is in question.

[15] EEOC v. Raymond Metal Products Co., —— F.2d ——, ——, No. 75-1007 (4th Cir. 1976).

that is not the case here. The union's willingness to negotiate even after suit was brought tends to negate any suggestion that timely conciliation of the sex discrimination charges would have been unsuccessful. When it became apparent that the commission's representative lacked authority to settle the case, the possibility of conciliation was dealt a severe blow by the very circumstances Congress sought to avoid—commencement of a civil action before attempting conciliation. Accordingly, we conclude that the district court should have dismissed the part of the commission's complaint which alleges that Local 182 caused the company to discriminate unlawfully on the basis of sex.

III

The district court also found that the company had engaged in race and sex discrimination in appointing supervisors. The evidence supports this finding. At both the Richmond and Virginia branches, the entry level position for supervisory personnel is assistant foreman. The company fills about 34 percent of the vacancies in this position by promoting hourly employees; it fills the balance by hiring new applicants. With no formal, objective, written standards for appointment, the company relies in part on recommendations from the union, which also lacks objective standards. Until 1963 the company appointed only white males to supervisory posts, and the enactment of Title VII failed to effect any immediate change in this policy. At the Richmond branch, the first black supervisor was appointed in 1966 and the second in 1971. As of June 1, 1973, there were only three, constituting 9.6 percent of the supervisory force of 31. In 1967 the company named its first female supervisor at the Richmond branch. By 1973 two (6 per-

cent) of the 31 supervisors were women. At the Virginia branch, a black employee was promoted to assistant foreman in 1963. In the next decade four more were appointed, so that by 1973 7.24 percent of the 69 supervisors were black. The first female was not appointed as a supervisor at this branch until 1972. Two more were appointed by June 1, 1973.

Before the trial of the case, neither a black employee nor a woman had ever been appointed to a supervisory position at the Richmond office. The court noted, however, that a vacancy existed, and the company proffered additional evidence that as of November 1, 1974, the Richmond office had one black supervisor and one white female supervisor on a staff of eight.

The district court enjoined the company from "implementing, maintaining, or giving effect to any criteria utilized for the selection of supervisory personnel which is designed to or has the effect of discriminating against black or female candidates for supervisory positions." It ordered the company to post job descriptions for these positions and to devise objective criteria for selecting new appointees. The propriety of these provisions of the court's decree is well settled. *See* Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972). We think, however, that on remand the court's decree should be enlarged to require the union to publish objective criteria for making its recommendations for supervisory appointments.

Finally, the district court ordered that vacancies in the assistant foreman, foreman, and office supervisory positions must be filled with qualified blacks and women, except

when none can be found, until the percentage of blacks and women equals the percentage of these classes of workers in the Richmond Standard Metropolitan Statistical Area (SMSA). The company's attack on this provision of the decree is two-pronged. First, it contends that Title VII condemns preferential hiring, especially when, as here, the preferences are absolute. It relies primarily on § 703(j) of the Act, 42 U.S.C. § 2000e-2(j), which provides in part:

> "Nothing contained in this subchapter shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of the race...[or] sex...of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race...[or] sex...employed...in comparison with the total number or percentage of persons of such race...[or] sex...in any community...or in the available work force in any community...."

This section plainly bans the use of preferential hiring to change a company's racial imbalance that cannot be attributed to unlawful discrimination. In Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971), the Court said:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

Uniformly, however, Title VII has been construed to authorize district courts to grant preferential relief as a remedy for unlawful discrimination. Rios v. Enterprise Association Steamfitters Local 638 of U.A., 501 F.2d 622, 628-31 (2d Cir. 1974); United States v. N. L. Industries, Inc., 479 F.2d 354, 377 (8th Cir. 1973); Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680, 683-86 (7th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 552-53 (9th Cir. 1971); United States v. International Brotherhood of Electrical Workers, Local No. 38, 428 F.2d 144, 149-51 (6th Cir. 1970); Local 53 of International Ass'n of Heat & Frost I. & A. Workers v. Vogler, 407 F.2d 1047, 1053-54 (5th Cir. 1969). This construction of the Act is in harmony with other cases which authorize preferential relief from unlawful employment discrimination in situations where Title VII is not applicable. Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9, 16-18 (1st Cir. 1973); Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 172, 176-77 (3d Cir. 1971). In all, eight circuits have approved some form of temporary preferential relief for discriminatory employment practices. *See* Sape, The Use of Numerical Quotas to Achieve Integration in Employment, 16 Wm. & Mary L. Rev. 481, 499 (1975). No court of appeals has ruled to the contrary, although there have been dissents.

We have not previously ruled on the issue, but in a case involving the Civil Rights Act of 1866 and the thirteenth and fourteenth amendments, we declined to impose quotas where the district court concluded that adequate relief could be obtained without their use. *See* Harper v. Klos-

ter, 486 F.2d 1134, 1136 (4th Cir. 1973). In view of the substantial precedent sanctioning preferential relief for unlawful discrimination, we reject the company's argument that Title VII forbids the remedy ordered by the district court. We recognize, however, that cases which approve such remedies caution that the necessity for preferential treatment should be carefully scrutinized and that such relief should be required only when there is a compelling need for it. *See* Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9, 17 (1st Cir. 1973). This brings us to the company's second reason for vacating the decree's provision for preferential appointment of supervisors.

The company argues that its appointment of black and female employees to supervisory positions already exceeds the ratio that preferential relief would require. Its argument rests on two premises. One, its conduct before the effective date of Title VII does not provide a proper base to measure its compliance with the Act; instead, it must be judged by the manner in which it filled vacancies after this date. Two, the district court erroneously considered the number of blacks and women in the Richmond SMSA workforce as a whole to ascertain a ratio of acceptable performance, instead of using only the blacks and women in the Richmond SMSA supervisory workforce.

We believe these premises are well founded. Title VII is not retroactive.[16] It does not provide a remedy for discrimination which occurred before it became effective in 1965. Robinson v. Lorillard Corp., 444 F.2d 791, 795 (4th Cir. 1971). At the Virginia branch 51 of the supervisors were appointed before Title VII prohibited discrimination

[16] The legislative history of Title VII indicates that it is not intended to be retroactive. *See* note 6 *supra.*

in their selection. They should not be counted in determining whether preferential hiring is required now. Between 1965 and 1973 the company appointed 18 assistant foremen, the entry level position for supervisors. Of that number, five (27.5 percent) were black and three (16.6 percent) were women. At the Richmond branch, 22 of the supervisors were appointed before Title VII became effective and nine afterwards. Of the nine, three (33.3 percent) were black and two (22 percent) were women. At the Richmond office, the evidence is not as clear. It has six entry level supervisory positions, which at the date of trial were filled by five white males with one vacancy. The district court found that four of the six positions had been filled after 1965. Subsequently, the company proffered evidence that it has promoted one black employee and one female to supervisory positions, constituting for each classification 16.6 percent of the appointments since 1965.[17]

The record discloses that 6.8 percent of the blacks and 1.5 percent of the women in the Richmond SMSA are placed in a category that includes supervisory personnel. Those percentages furnish a more realistic measure of the company's conduct than the gross percentage of blacks and women in the whole workforce, including unskilled labor. *See* Harper v. Mayor, 359 F.Supp. 1187, 1193 n.5 (D.Md), *aff'd sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

The fact that the company's appointments since 1965

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[17] The district court declined to reopen the record to consider this proffer. Under the ratio that the court used for comparative purposes, the evidence had but slight probative effect. Its import, however, is magnified by acceptance of the company's premise that its performance since 1965 is what must be examined in determining whether it has violated the Act. On remand the court should reexamine the situation at the Richmond office.

exceed the ratio of qualified blacks and women in the workforce does not exonerate the company for the violations of the Act which the district court found. The tardy appointments of blacks and women to supervisory positions long after the passage of Title VII and the present lack of published job descriptions and objective selection procedures fully justify the injunctive relief the district court ordered. We believe, however, that the rate at which the company currently appoints blacks and women to supervisory positions is sufficient to show that there is no compelling need for the imposition of a quota.[18] *But see* Karst & Horowitz, Affirmative Action and Equal Protection, 60 Va. L. Rev. 955 (1974).

IV

The company contends that the charge filed with the EEOC on January 3, 1969, was not timely because there were no discriminatory practices at either branch after January 15, 1968. It argues that for this reason the action should be dismissed for failure to meet the jurisdictional requirement of a timely charge.[19] The district court, however, found that the discrimination was of a continuing nature and properly held that the charge was timely. Williams v. Norfolk & Western Ry., ____ F.2d ____, No.

[18] We do not mean to suggest that the company may use its percentage of black and female supervisors as a defense to future charges of discrimination against blacks and women. It must consider each application on its merits. If the company discriminates against a black or a woman, it can be called to account for violating Title VII, regardless of the percentage of blacks and women among its supervisors.

[19] Before the 1972 amendments to Title VII, a charge had to be filed with the EEOC within 90 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(d) (1964). In 1972, this period was changed to 180 days. 42 U.S.C. § 2000e-5(e).

74-1549 (4th Cir. 1975); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 994 (D.C. Cir. 1973); *see* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 467 n.13 (1975) (dictum).

The district court ruled that the filing of the charge in 1969 did not toll the statute of limitations for the § 1981 action which was filed in 1973. The Supreme Court recently confirmed the district court's correct understanding of the law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

The district court applied the Virginia five-year statute of limitations to the § 1981 action. We have ruled, however, that the state's two-year statute applies to § 1982 actions. Allen v. Gifford, 462 F.2d 615 (4th Cir. 1972). Both § 1981 and § 1982 were enacted to redress infringements of closely related civil rights. We conclude, therefore, that the same two-year statute should apply to § 1981 actions. *Accord,* Revere v. Tidewater Telephone Co., No. 73-1390 (4th Cir., October 2, 1973) (unpublished opinion applying the two-year statute to a § 1981 action); *cf.* Almond v. Kent, 459 F.2d 200 (4th Cir. 1972). Accordingly, on remand, the two-year statute of limitations should be applied to the § 1981 claim. Of course, the point has little practical significance in this case in view of the fact that the § 1981 action was not tolled by the filing of the charge with the EEOC.

The district court ruled that back pay for sex discrimination should accrue from April 8, 1967, two years before the charge was filed with the EEOC. The two-year period mentioned by the district judge conforms with the statute.[20] However, this charge did not allege discrimination against women. Instead, this type of discrimination was initially

[20] 42 U.S.C. § 2000e-5(g).

disclosed by the EEOC's investigation.[21] Dealing with similar circumstances, we held in EEOC v. General Electric Co., —— F.2d ——, No. 74-1974, slip op. at 34-36 (4th Cir. 1975), that in the absence of countervailing equities a trial court should limit back pay to two years before the employer received notice of the results of the investigation. On remand the district court should reconsider its decree in light of this case.

The judgment is affirmed in part and modified in part, and the case is remanded for further proceedings consistent with this opinion.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in large part with the opinion of the court for the reasons stated in the opinion. I differ, however, in some respects, and as to those I respectfully dissent.

So far as the opinion is based on *EEOC* v. *General Electric Company*, No. 74-1974 (4th Cir. 1975), I dissent for the reasons set forth in my dissent in that case, our judgment in which is not yet final. I should say, however, that this case may be a somewhat closer one than *General Electric* because here, at least, sex discrimination was the subject of the EEOC complaint, while in *General Electric* it was not. This case points up the importance of requiring the EEOC to comply with its own regulations as well as the statute. The union here is excused from liability for discrimination on account of sex because the statute was not complied with. The reason especially emphasized and held is that ". . . a suit brought by the commission before attempting conciliation is premature," p. 31, because " . . . the commission's statutory duty is to attempt conciliation is

[21] *See* Part II *supra.*

among its most essential functions." p.32. Despite the fact that both the company and the union were deprived of the first conciliation step as set forth in 29 CFR § 1601.19a, as well as the statutory benefits of conciliation attempts, the company is held to liability, while the union is not, although the liability was caused by the collective bargaining agreement signed by both the company and the union. Thus, I dissent not only from the finding against the company, but also from the disparate treatment awarded the company and the union on facts which are indistinguishable.

While the subject of collective bargaining agreements is at hand, I should say I have grave reservations about considering evidence in this type case of the respective positions taken by the company and the union in negotiations leading up to collective bargaining agreements when the agreement results in unlawful discrimination. This is tantamount to allowing a good faith defense disapproved by us in *Moody* v. *Albemarle Paper Company*, 474 F2 134 (4th Cir. 1973). (Modified on other grounds, 422 US 405 (1975). [*sic*]

The district court had only this to say about damages:

> "The formulation of the method of calculation and distribution of the back pay award and adjustment to the pension and profit-sharing plans will be complex—sufficiently so as to tax the ingenuity and good faith of counsel. In this regard counsel are directed to confer with a view to agreeing on a plan of calculation and distribution of the back pay award for submission to the Court—and, indeed, to explore the possibility of settling the monetary aspects of the case." App. p. 42.

With the opinion of the district court in mind, it is seen that the method of computing damages was not considered

by that court and is not properly before this court, *McGowan* v. *Gillenwater*, 429 F2 586 (4th Cir. 1970) [*sic*], so the detailed discussion of that subject is a dictum. If the district court, in ascertaining damages, adopts standards with which either side is in disagreement, either is at perfect liberty to appeal the award. Taking up the matter now, and especially its treatment in detail, when the matter is so "complex" as to "tax the ingenuity and good faith of counsel," and upon no record, is too great a departure from what I conceive to be the proper rule of courts expressing opinions only with reference to existing controversies. There is no controversy at this time between the parties about this matter, and an expression of opinion I think beyond the legitimate function of an appellate court. I express no opinion as to the correctness of the dictum.

We hold that the imposition of quotas for supervisory positions is error because the "rate at which the company currently appoints blacks and women to supervisory positions is sufficient to show that there is no compelling need for the imposition of a quota," and, then, in note 18, explain that the maintenance of a quota is not a defense to a charge of racial or sexual discrimination. In view of our holding and note 18 just referred to, I think we go out of our way just earlier in the opinion to justify the imposition of quotas in hypothetical cases.

Since quotas themselves are the rankest kind of discrimination and their application, if valid in any context, requires exaggerated facts not present here, that general subject would be better left for another day.

Senator Clark, one of the sponsors of the statute and one of the Senate floor managers, filed, in Legislative History, 3014, in response to objections made by opponents of the

legislation, a series of answers to the objections, among them the following (p. 3015):

> "Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> "Answer: Quotas are themselves discriminatory."

In view of the fact that the very existence of a quota is constitutionally suspect, the just quoted legislative interpretation of the statute, and our holding, such justification in hypothetical cases I think is out of place.

Order of the Supreme Court Denying Petitions for Certiorari

No. 76-46

THE AMERICAN TOBACCO COMPANY, ET AL,

Petitioners,

v.

JOHN PATTERSON, ET AL,

Respondents.

No. 76-56

TOBACCO WORKERS' INTERNATIONAL UNION, ET AL,

Petitioners,

v.

JOHN PATTERSON, ET AL,

Respondents.

November 1, 1976. Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit Denied.

Order of the District Court Denying Motions to Reconsider and Vacate Prior Findings of Liability

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JOHN PATTERSON, ET AL,
Plaintiffs,

VS.

THE AMERICAN TOBACCO COMPANY, ET AL,
Defendants.

Civil Action No. 101-73-R

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Plaintiffs,

VS.

AMERICAN BRANDS, INC., ET AL,
Defendants.

Civil Action No. 104-73-R

ORDER

Defendants having moved to vacate this Court's Orders of January 7, 1977 and dismiss the Complaints in these cases, the Court, for the reasons stated in the Court's original opinion of September 25, 1974 and those stated from the bench on October 21, 1977, denies their motions.

Defendants based their motions on three recent opinions of the Supreme Court, *International Brotherhood of Teamsters* v. *United States,* 97 S.Ct. 1843 (1977); *United Airlines* v. *Evans* 97 S.Ct. 1885 (1977); and, *Hazewood* [sic]

School District v. *United States*, 97 S.Ct. 2736 (1977). For the reasons stated below I find that the Supreme Court's rulings in these cased [sic] do not warrant the dismissal of the Complaints or the vacating of the January 7, 1977 Order on Guidelines for Back Pay Proceedings. The post January 15, 1968 seniority system of the defendants in this case is not a bona fide system under *Teamsters* v. *United States* 97 S.Ct. 1843 (1977) not merely because it perpetuated Pre-Act discriminatory practices as the defendants alledge [sic], but because this system operated right up to the day of trial in a discriminatory manner. (*See, Teamsters supra* 97 S.Ct. 1860. Note 28). This seniority system had a discriminatory genesis *(See Teamsters, supra* 97 S. Ct. 1865. The background of labor relations of this Company and the seniority system clearly shows this to be true. The record in this case clearly supports this finding.

The fact that the defendants' seniority system operated in a discriminatory fashion right up to the day of trial distinguishes these cases from *Evans, supra* 97 S.Ct. 1889 (1977). At least two of the three cases cited in the motion to dismiss, *Teamsters* and *Evans*, go out of their way to point out that they are not discussing any seniority system that is not bona fide.

As far as *Hazelwood* is concerned, the Supreme Court's decision rests on the question of whether the defendant should have been allowed to put on evidence to rebut the plaintiff's prima facie case. The defendants here was [sic] allowed, and they did, put on a substantial amount of evidence in an unsuccessful attempt to rebut the prima facie case. *Hazelwood*, therefore, is inapplicable to these cases.

By the same token the Court is not willing to adopt the plaintiff's view that *Hazelwood*, as applied by the Fifth

Order of the District Court Denying Motions to Reconsider and Vacate Prior Findings of Liability

Circuit's decision in *James* v. *Stockhom Values & Fittings Company*, — F.2d—, 15 E.P.D. § 7842 (5th Cir. 1977), alters the Fourth Circuit's modification of this Court's relief provisions with respect to the preferential hiring of supervisory personnel.

Defendants have also moved for certification of this Court's decision to deny their Motions to Vacate and Dismiss. The Court denies that motion.

ENTER: 12/23/77

G.V.B.
United States District Judge

Panel Opinion of the Court of Appeals ("Patterson II")

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 78-1083, 78-1084.

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR, each individually and on behalf of all other persons similarly situated, and Equal Employment Opportunity Commission,

Appellees,

—v—

The AMERICAN TOBACCO COMPANY, a Division of American Brands, Inc.,

Appellant.

and

TOBACCO WORKERS' INTERNATIONAL UNION, an unincorporated association, et al.,

Defendants.

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR, each individually and on behalf of all other persons similarly situated, and Equal Employment Opportunity Commission,

Appellees,

—v—

TOBACCO WORKERS' INTERNATIONAL UNION, an unincorporated association, Local 182, Tobacco Workers' International Union, an unincorporated association,

Appellant.

Argued April 6, 1978. Decided Oct. 23, 1978.

Before WINTER, BUTZNER and WIDENER, Circuit Judges.

Panel Opinion of the Court of Appeals ("Patterson II")

Henry T. Wickham, Richmond, Va. (John F. Kay, Jr., Stephen A. Northup, Mays, Valentine, Davenport & Moore, Richmond, Va., Paul G. Pennoyer, Jr., Arnold Henson, Bernard W. McCarthy, Chadbourne, Parke, Whiteside & Wolff, New York City, on brief); Jay J. Levit, Richmond, Va. (James F. Carroll, New York City, on brief), for appellants.

Henry L. Marsh, III, Richmond, Va. (S. W. Tucker, Randall G. Johnson, Richmond, Va., John W. Scott, Jr., Chapel Hill, N. C., Hill, Tucker & Marsh, Richmond, Va., on brief); Ramon V. Gomez, Atty., E. E. O. C., Washington, D. C. (Abner W. Sibal, Gen. Counsel, Joseph T. Eddins, Associate Gen. Counsel, Beatrice Rosenberg, Asst. Gen. Counsel, E. E. O. C., Washington, D. C., on brief), (Jack Greenberg, Barry L. Goldstein and O. Peter Sherwood, New York City, on brief), for appellees.

WINTER, Circuit Judge:

These appeals by American Tobacco Company (American) and Tobacco Workers' International Union (Union) from the district court's denial on the merits of their motion under F.R.Civ.P. 60(b) require us to decide whether our decision in *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4 Cir.), *cert. denied*, 429 U.S. 920, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976), and the order of the district court implementing our views, must be modified to conform to the later decisions of the Supreme Court in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *United Airlines, Inc.* v. *Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); and *Hazelwood School District* v. *United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). The district court thought not, but we think that *Teamsters* re-

quires further proceedings. We therefore affirm in part and vacate and remand in part.

I.

Briefly stated, the instant case is a consolidation of an action by EEOC and a class action by black employees to redress race and sex discrimination in working conditions at three facilities operated by American in Richmond, Virginia. The district court found that, before 1963, racial discrimination in hiring, promotion and working conditions was overt. The district court found no discrimination in American's hiring practices after 1965, but it did find that, while promotional policies after 1968 were "facially fair and neutral," they were discriminatory in operation because they served to perpetuate the effects of past discrimination. The district court granted sweeping relief; but, as modified by us, the relief granted was limited to (1) requiring American to post more definite written job descriptions when vacancies occurred; (2) requiring American to eliminate lines of progression in six of nine job groups; (3) requiring American to permit blacks in the prefabrication department in one branch to transfer to a job in the fabrication department at another branch without losing company seniority despite American's longstanding policy disallowing inter-branch transfers with retention of company seniority; (4) granting back pay to employees unlawfully denied promotion; and (5) requiring American to develop and apply objective criteria for appointing supervisory personnel. A fuller description of the facts, the district court's decision and our views appears from our opinion in *Patterson* v. *American Tobacco Co., supra.* As needed, we will amplify our description of them elsewhere in this opinion.

Panel Opinion of the Court of Appeals ("Patterson II")

We turn to a consideration of the effect of each of the subsequently decided Supreme Court cases.

II.

So far as pertinent here, *Teamsters* concerned an employer who was a common carrier of motor freight with nationwide operations. The employer had been found to have engaged in a pattern and practice of employment discrimination against Negroes and Spanish-surnamed Americans in hiring line drivers. The members of these minority groups had been hired only in lower paying, less desirable jobs as servicemen or local city drivers. Thereafter they were discriminated against with respect to promotions and transfers because of the seniority system established by the collective bargaining agreements between the employer and the union. That system provided that a line driver's seniority for competitive purposes, such as the order in which he may bid for particlular jobs, is laid off or is recalled from layoff, dated from the date he became a line driver and not the date that he was initially employed if he had been employed originally as a city driver or serviceman.

The Court had no difficulty in concluding that the vice of this seniority arrangement was that it "locked" minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers, and the Court concluded that under *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the seniority system would be invalid, unless § 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) required a different conclusion.[1] From its review of the

[1] In pertinent part, § 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of

language of § 703(h) and its legislative history, the Court said that with respect to pre-Act discrimination "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." 431 U.S. at 352, 97 S.Ct. at 1863. Stressing the language of § 703(h), however, the Court also held that the statute "does not immunize *all* seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race . . . or national origin. . . .'" (Emphasis added.) 431 U.S. at 353, 97 S.Ct. at 1863. The overall holding of the Court was that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-54, 97 S.Ct. at 1864.

As construed by the Court in *Teamsters*, § 703(h) carves out an exception to the holding of *Griggs* that an otherwise neutral practice which perpetuates the effects of past employment discrimination is violative of Title VII. As we read *Teamsters*, this is a narrow exception, concerning only practices directly linked to "a bona fide seniority system." Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it insulates only the seniority aspects of the promotional system. Consequently, *Teamsters* requires no modification of the relief we approved with regard to job descriptions, lines of progression, back pay (except such awards as may have been founded upon American's seniority system) or supervisory appointments. Only our decision to

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employment pursuant to a bona fide seniority . . . system . . ., provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

allow black employees to make interbranch transfers with the retention of company seniority impinges upon American's *seniority* system. It is, therefore, only this aspect of the relief granted in *Patterson* that is called into question by *Teamsters*.

In conforming our decision to *Teamsters*, we recognize the limitation of its holding that under § 703(h) only "bona fide" seniority systems insulate the present effects of pre-Act discrimination.[8] In the instant case, the district court was equally aware of this limitation. It concluded, however, that American's seniority system was not bona fide (1) "because this system operated right up to the day of trial in a discriminatory manner," and (2) because "[t]his seniority system had a discriminatory genesis . . . [t]he background of labor relations of [American] and the seniority system clearly shows this to be true . . . [t]he record in this case clearly supports this finding."

While we agree with the district court that American's seniority system would not be bona fide if it either currently served a racially discriminatory purpose or was originally instituted to serve a racially discriminatory purpose, we cannot sustain the district court's ultimate findings in this regard. The district court made no subsidiary findings,

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[8] Because in *Teamsters* it was conceded that the seniority system "did not have its genesis in racial discrimination, and . . . was negotiated and has been maintained free from any illegal purpose," 431 U.S. at 356, 97 S.Ct. at 1865, the Court did not find it necessary to expound on the factors which make a seniority system "bona fide." In approving the concession, the Court did state that the system applied to all employees, regardless of race or national origin, that all non-line drivers were locked into their positions, and that separate employment conditions for line drivers was "rational" under industry practice and precedents of the National Labor Relations Board. But it gave us and the other lower federal courts no additional guidance. We do not attempt an overall definition of "bona fide" at this stage of this case; we await the full development of the facts.

either in its initial decision or in its ruling on the Rule 60(b) motions, to support its ultimate conclusions. It is thus impossible for us to tell upon what underlying facts the district court relied and whether proper statutory standards were observed. *See Kelley* v. *Everglades Drainage District,* 319 U.S. 415, 422, 63 S.Ct. 1141, 87 L.Ed. 1485 (1943); *Schneiderman* v. *United States,* 320 U.S. 118, 130, 63 S. Ct. 1333, 87 L.Ed. 1796 (1943); *O'Neill* v. *United States,* 411 F.2d 139, 145-46 (3 Cir. 1969); *Woods Construction Co.* v. *Pool Construction Co.,* 314 F.2d 405, 406-07 (10 Cir. 1963); *Knapp* v. *Imperial Oil & Gas Products Co.,* 130 F.2d 1, 3–4 (4 Cir. 1942).

It is not surprising that the district court's findings in its original decision did not completely assay the field since *Teamsters* had not yet been decided. While ordinarily we would not think that F.R.Civ.P. 52 requires the same degree of specificity in findings of fact when a Rule 60(b) motion is denied on the merits as it requires in a non-jury trial, the fact is that in the instant case the decision in *Teamsters* intervened between the initial decision on the merits and the denial of the Rule 60(b) motions. Since the effect of *Teamsters* raised new and difficult issues, we think that we are justified in requiring full compliance with Rule 52. That compliance necessitates remanding the issue to the district court for further findings. On remand, the district court may reopen the record and receive additional proof with regard to the bona fides of American's seniority plan since that issue emerged after the original record was made.

III.

We think that neither *United Air Lines, Inc.* v. *Evans, supra,* nor *Hazelwood School District* v. *United States,*

requires us to modify our original decision in the instant case.

Evans held that Title VII was not violated by an employer which, consistent with its bona fide seniority system, declined to grant retroactive seniority to an employee who was rehired after having been earlier discharged as a result of a discriminatory practice, when that employee at the time of her discharge had failed to file a timely charge with EEOC. American and the Union contend that *Evans* stands for the proposition that American's promotional system may not now be modified despite a finding of a *Griggs* violation, because plaintiff's failed to file a timely challenge to this system after its adoption in 1968. We do not read *Evans* so broadly. *Evans* dealt only with a one-time violation (a discriminatory discharge) which had a continuing effect only as the result of an otherwise neutral seniority system. It did not deal with a continuing violation such as a discriminatory promotional system where the discrimination continues from day to day and a specific violation occurs whenever a promotion is made. *Evans* does not purport to limit the broad remedial powers of a federal court. But for § 703(h) and its validation of the present effects of a bona fide seniority system, a court, in a proper case like the instant one, may still redress the present effects of past discrimination by requiring the modification of present practices which repeat that discrimination.

Hazelwood was a case of racial discrimination in the employment of school teachers for public schools. So far as pertinent here, it held that (1) in determining from statistical proof whether a prima facie case of discrimination had been shown, the proper consideration was between the racial composition of the school district's teaching staff and the racial composition of the qualified public school

teacher population in the relevant labor market, and (2) if that comparison showed sufficient substantial disparity to constitute a prima facie case, the employer must still be given the opportunity to show that the disparity resulted from pre-Act hiring rather than illegal post-Act discrimination. That is, *Hazelwood* admonishes courts in Title VII cases to give careful consideration to post-Act hiring data.

American and the Union contend that, when properly applied, *Hazelwood* requires the conclusion that the district court's determination that American had practiced racial and sexual discrimination in the employment of supervisory personnel cannot stand and that that finding and the relief flowing from the alleged violation must be set aside. Essentially, their argument is that liability was found solely on statistics showing the percentages of blacks and females in American's supervisory work force at various dates, but that there was no comparison with the relevant supervisory population nor were the pre-Act supervisory appointments eliminated from the relevant statistics.

To these contentions, there are various answers. As the district court recognized in denying the Rule 60(b) motions, *Hazelwood* is in part a decision as to what constitutes a prima facie case. In the instant case, American and the Union were not held to have violated the Act on the theory that a prima facie case was proved against them. They were given full opportunity to rebut the statistical proof, and they availed themselves of it. The total proof, even under *Hazelwood*, showed violations.

In our earlier opinion, we disclosed our recognition of the total proof in discussing what relief would be appropriate. We stated our recognition that Title VII was not retroactive and that the racial and sexual percentages of appointments after Title VII became effective were the

significant ones. 535 F.2d at 274. Nonetheless, we concluded that, notwithstanding that appointments since 1965 of qualified blacks and women exceeded the ratio of these groups in the workforce, American was not exonerated from a violation of Title VII because "[t]he tardy appointments of blacks and women to supervisory positions long after the passage of Title VII and the present lack of published job descriptions and objective selection procedures fully justify the injunctive relief the district court ordered." 535 F.2d at 275. *Hazelwood* clearly recognizes the sufficiency of such proof. 433 U.S. at 309–10 n. 15, 97 S.Ct. 2736.

We therefore conclude that *Hazelwood* not only requires no modification of our prior holding with respect to supervisory personnel, but indeed reinforces our views.

For these reasons, the order of the district court denying the motions of American and the Union under F.R.Civ.P. 60(b) on their merits is affirmed in part and vacated and remanded in part for further proceedings consistent with this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

WIDENER, Circuit Judge, concurring and dissenting:

I agree that the case should be remanded for reconsideration in the light of *Teamsters*, although I do not agree with the narrow construction of *Teamsters* which the majority advocates.

I respectfully dissent from the refusal of the majority to remand the case for reconsideration in the light of *Hazelwood*, and also respectfully dissent from the refusal of the majority to require a reconsideration of the case on remand in the light of *Evans*.

Panel Opinion of the Court of Appeals ("Patterson II")

I

The evidence in this case upon which the district court found liability was statistical. That court did not find "specific proof of overt or particular acts of discrimination." The whole case must be read with that background.

II

The facts in this case are found by the district court, and I accept them for the purpose of this dissent. My disagreement with the majority as it refuses to apply *Hazelwood* is not a factual dispute; rather, I dissent from its refusal to apply that case in a factual situation which demands its consideration.

III

Teamsters

While I have indicated that I concur in the remand for reconsideration in the light of *Teamsters*, I think the remand too narrow in at least one respect.

In our opinion, the bounds of our remand were based on the following statement:

> "As construed by the Court in *Teamsters*, § 703(h) carves out an exception to the holding of *Griggs* that an otherwise neutral practice which perpetuates the effects of past employment discrimination is violative of Title VII. As we read *Teamsters*, this is a narrow exception, concerning only practices directly limited to 'a bona fide seniority system'. Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it insulates only the seniority aspects of the promotional system." P. 303.

Panel Opinion of the Court of Appeals ("Patterson II")

We then continue, "Consequently, *Teamsters* requires no modification of the relief we approved with regard to job descriptions, *lines of progression*, back pay (except such awards as may have been founded upon American's seniority system) or supervisory appointments." (Italics added).

It is to the part of our opinion respecting "lines of progression" that I here take exception as well as to the reasoning.

We decline to require the district court to reconsider that matter because *Teamsters* insulated only "seniority aspects" of the system, our construction of § 703(h) being a "narrow exception" to the holding of *Griggs*.

I doubt that we should say a statute enacted by Congress which has just received a literal construction by the Supreme Court in *Teamsters* can be said to be a "narrow exception." By the same token, I doubt that *Teamsters* can be said a "narrow exception" to *Griggs*, or that both *Teamsters* and § 703(h), read together, make up a "narrow exception."

It is entirely in line with our limiting of *Teamsters* and § 703(h) that we disregard footnote 41 at p. 355, 97 S.Ct. at p. 1864 of *Teamsters*. That note provides in pertinent part:

> "Then as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a *line of progression*. . . . (citations omitted). The legislative history contains no suggestion that any one system was preferred."

The opinion of the district court does not discuss in any detail the origin of the lines of progression referred to in paras. 38–47 of the stipulation of the parties. Neither does

Finding 38 of the district court, which, with three exceptions, finds them not justified by business necessity. How or if lines of progression are tied to a seniority system, especially to a collective bargaining agreement, whether bona fide or not, was simply not contemplated by the parties, by the district court, or by us in our previous opinion. Neither are any details of their operation shown. This is shown not only by the opinion and findings of the district court but by the references in our previous opinion to the lines of progression summarized accurately by this quotation: "In this respect, the lines of progression perpetuated the effects of past discrimination in a manner similar to the formerly segregated departmental seniority rosters." p. 264. It is at once apparent that the situation just described from our opinion in this case is very similar to the situation which faced the Court in *Teamsters*, as described by the Court at p. 350, 97 S.Ct. at p. 1862: "This disproportionate distribution of advantages does in a very real sense 'operate to "freeze" the status quo of prior discriminatory employment practices.' " This point should be of especial interest to the union defendants, for while we recited, at p. 270, that the "local acquiesced without protest in the lines of progression," it might be of significant difference if the lines of progression were part of a bona fide seniority system. And from all of the defendants' standpoints, it undoubtedly makes a difference as to whether there is one defense to assert, business necessity, or two, business necessity and § 703(h).

Nothing in the record shows that the lines of progression here are significantly different from those described in the Cooper and Sobol Article found in 82 Harvard L.Rev. 1598 which the Court referred to in note 41.

For these reasons, I think the question of whether the

"lines of progression" are a part of a bona fide seniority system, all aspects of which we have dismissed in our opinion with little discussion, is worthy of further examination in the light of *Teamsters*, especially n. 41 thereof. I express no opinion on the merits of the question, but I insist it should be factually developed because the law has changed since our opinion, as everyone acknowledges.

IV

Hazelwood

A. The Richmond office, with only four or five vacancies involved, as distinguished from the Richmond branch, is not a part of this appeal, and I do not consider it in this dissent.

B. I am in basic agreement with the statement in the proposed opinion, page 12, that "*Hazelwood* admonishes courts in Title VII cases to give careful consideration to post-Act hiring data," but I cannot agree with its application to affirm the district court's finding of liability as to the defendant's selection of supervisory personnel.

What the opinion overlooks is that *Hazelwood* establishes that a Title VII employer which from the applicable date "made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes." 433 U.S. at 309, 97 S.Ct. at 2742. Reviewing the findings of the district court with regard to supervisory promotion and hiring, I do not find the evidence of post-Act discrimination compelling; indeed, if we must find one way or another, the opposite seems to be true. In considering the statistics set out below, I note that the defendants claim that in the Richmond SMSA, the relevant labor market under *Hazelwood*, black people constitute

App. 64). The first female supervisor at the Virginia branch 12% of those eligible for the supervisory work force, and females 5%. Appellants' brief in Nos. 78–1083–84, at pages 9–10 and 37. These figures are the same as the defendant company's opening brief, page 14, in Nos. 75–1259 through 63. I have been unable to find in plaintiff's brief either on this or the previous appeal, or in the EEOC brief in Nos. 75–1262/1263, any dispute that 12% and 5% are the correct figures for the Richmond SMSA, so I consider them to be correct, for they favor the plaintiffs more than the SMSA figures we used in our previous opinion, p. 275, 6.8% black and 1.5% women. Employment of the percentages we used before would weight that I have to say far more toward the defendants.

At the Virginia branch, I note the district court found that since the effective date of Title VII "at least eighteen employees have been hired for or promoted to the position of assistant foreman...." (Finding (F.16), App. at page 58). The court further found that in 1963 the first black supervisor was promoted from the ranks at the Virginia branch (F.47, App. 63); that as of May 16, 1969 three supervisors were black (F.48, App. 63); that as of April 16, 1973 five supervisors were black (F.49, App. 64); and that as of January 1, 1974 six supervisors were black (F.50, was selected in 1972 (F.100, App. 75–76); and as of June 1, 1973 there were three female supervisors (F.101, App. 76).

Applying the relevant percentages of the Richmond SMSA under the *Hazelwood* analysis, we would expect that if defendants had selected the eighteen post-Act supervisors in a non-discriminatory manner, 12% of them or 2.16 would be black, and 5% or .9 would be female. The district court's findings do not, unfortunately, indicate the date,

race, and sex of each post-Act Virginia branch supervisor selection, and most importantly do not indicate the date of each vacancy, the person who filled it, and the applications for the position. But, it is almost certain that of the six black supervisors employed on January 1, 1974, five were appointed after July 1, 1965. See plaintiff's exhibit 35J. Ex.App. 127–131. If this is true, five of the eighteen supervisory post-Act selections were black, a percentage of 27.7%, more than twice the figure to be expected under *Hazelwood*. By May 16, 1969, only four months after the EEOC complaint had been filed and almost four years *before* either suit was filed, it again seems almost certain that of the three black supervisors then employed, two were hired post-Act. See plaintiff's exhibit 35J. Assuming that after that date only black people were selected as supervisors (the worst case for defendants playing catch-up), even as of May 1969, two of thirteen post-Act selections or 15.3% were black. Thus, by 1969 the defendants already had exceeded the percentage to be expected under *Hazelwood*.

Analyzing the finding of sex discrimination in the selection of Virginia branch supervisors leads to very much the same result. The first female supervisor was selected in 1972 (F.100, App. 75–76), and with that selection the company had exceeded the *Hazelwood* expected percentage, for if only one of eighteen post-Act supervisory appointments were female this would be 5.5%, exceeding the expected *Hazelwood* percentage of 5%. In fact, three of the eighteen post-Act supervisory appointments were female, a percentage of 16.67% or more than three times the *Hazelwood* expected figure.

At the Richmond branch similar results obtain as at the Virginia branch. There were nine post-Act supervisory selec-

tions at the Richmond branch (F.17, App. 59). The first black supervisor at the branch was selected from the ranks June 1, 1966 (F.51, App. 64). The second black supervisor was selected from the ranks February 1, 1971 (F.53, App. 64). As of June 1, 1973 there were three black supervisors (F.56, App. 64). Applying *Hazelwood*, we would expect to find 12% or 1.08 of the nine selectees were black. This figure was reached by the 1966 promotion (since I think we must disregard the .08 person), almost three years *before* the EEOC complaint was initiated and seven years *before* the filing of either case. In fact, from the district court's findings it appears that three of the nine post-Act selections went to black people; this 33% figure considerably exceeds the *Hazelwood* expected figure of 12%.

The first female supervisor at the Richmond branch was selected from the ranks in 1967 (F.102, App. 76). By June 1, 1973, there were two female supervisors (F.88, App. 70; F.103, App. 76). Under *Hazelwood* we would expect 5% or .45 of the nine supervisors to be female. The 1967 selection, two years *before* the EEOC proceedings, and years before suit was filed, more than doubled the expected percentage, and the additional post-Act selection of another woman by 1973 presents a figure of 22%, more than four times the expected figure of 5%.

To summarize the pertinent data:

		Hazelwood percentage	*Actual percentage*	*Date of meeting Hazelwood expectancy*
Virginia Branch:	black	12%	27.7%	May 16, 1969
	female	5%	16.67%	1972
Richmond Branch:	black	12%	33%	June 1, 1966
	female	5%	22%	1967

Panel Opinion of the Court of Appeals ("Patterson II")

Defendants have made similar points in their brief, see opening brief in Nos. 78–1083/84 at 9–10, 37–38, but we did not consider them in our opinion.

These post-Act data indicate that in every circumstance at the Richmond and Virginia branches the actual selection of supervisors surpassed the numbers we might expect when applying, as we must, the methodology of *Hazelwood*. We may not, I think, on these data, consistent with *Hazelwood*, affirm the district court's finding of discrimination in supervisory selections. If the selection of supervisory personnel outlined above does not statistically satisfy the Supreme Court's requirement that post-Act employment decisions be made on a nondiscriminatory basis, the company and union justifiably may ask what post-Act actions could have statistically complied with our interpretation of Title VII.

As the data disclose, post-Act supervisory selections have favored, rather than burdened, women and black people. Accordingly, on the record we should vacate the injunction ordering the company to develop objective criteria for the selection of supervisors. The statistics verify that no adverse impact has been visited upon the plaintiff classes as a result of the subjective criteria, and thus there is no need for equitable relief. If we affirm the injunction, we will be ruling in effect that subjective selection criteria are a *per se* violation of Title VII, that is, a violation regardless of whether the practice has adversely affected a protected class. That the practice has not been proved to have affected any individual must be conceded absent further factual development. In fact, on the record as it now stands, not only is injunctive relief uncalled for, but in the absence of any evidence except the statistics and evidence now before us, I think we should properly direct the entry of judgment for the defendants on the entire issue of supervisory selection at the Richmond and Virginia branches. When I say absence

of other evidence except statistics and that presently in the record, I keep in mind the absence of objective criteria and tardy appointments. I think I have demonstrated above that so far as this record shows the appointments were not tardy at the Richmond and Virginia branches unless pre-Act appointments are included which *Hazelwood* forbids. The plaintiffs, having not proved by post-Act statistics any adverse effect on the plaintiff classes, and the appointments not being tardy, the mere fact that there is no objective criteria for promotions in this case is irrelevant. I grant that in a proper case it may be relevant, and having objective criteria might seem to be prudent to avoid suspicion, but I doubt that our authority extends so far when no post-Act violation has been shown. Indeed, we have recently been reminded of that fact in *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), when the Court said: "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." P. ——, 98 S.Ct. p. 2950.

My construction of *Hazelwood* is fortified by the following quotation from *Teamsters*, p. 350, 97 S.Ct. p. 1862, upon which the Court depended and which comes from the Congressional Record:

> " 'Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, *if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis.* He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes or to prefer Negroes for future vacancies, or, once Negroes are hired to give them

> special seniority rights at the expense of the white workers hired earlier.' 110 Cong.Rec. 7213 (1964) (emphasis added)." (Italics are the Supreme Court's.)

In view of the facts found by the district court I have recited, I think it is apparent that we did not apply the principles of *Hazelwood*. Our opinion, I think, misconceives its holding. That case requires, at the very least, in a matter such as we have before us, which depends on statistical evidence for a finding of liability, an analysis of the employer's and the unions' actions since the enactment of Title VII. A reading of the findings and opinion of the district court discloses that it did not make such an analysis, and a reading of our opinion discloses that we did not. While we did indicate, at p. 264 of our earlier opinion, that "after the effective date of Title VII" the company and union discriminated, a review of our analysis of the supervisory appointments which is part III of that opinion, beginning at p. 277, at once should show us our error. There, we considered the dates of some, but not all, post-Act appointments and found them "tardy" notwithstanding that they exceeded statistical sufficiency when measured as a group. *What we did not consider, as did not the district court, were the dates of each of the appointments as well as the dates of each of the various vacancies which brought about the appointments.* That is what *Hazelwood* commands, and that is where, lacking *Hazelwood's* guidance, we erred. Our error is pointed up in *Furnco*, —— U.S. at p. ——, 98 S.Ct. at p. 2951, where the Court states: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." (Italics are the Court's). Neither we nor the district court con-

sidered *each* vacancy, the date thereof, and how it was filled, as the beginning point of a statistical analysis. Absent such, any conclusion based on statistical inferences may not stand in the light of *Hazelwood*.

The statistical facts I have used are undisputed and found by the district court. Yet there are certain omissions in them because a *Hazelwood* analysis was not engaged in. I am also aware that an employer cannot, by playing catch up, "erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it." *Teamsters* p. 342, 97 S.Ct. p. 1857. Yet those affected must be "victims of the earlier post-Act discrimination." *Teamsters* p. 342, 97 S.Ct. p. 1857. For these reasons, in order to be entirely fair, I would not enter judgment for the defendants, but would remand the case to have the district court inquire into each promotion to supervisory status made since the enactment of the statute, as well as far enough prior to its enactment to insure continuity. There have been so few post-Act appointments, less than 30, that such an inquiry is a small task. Only by a post-Act analysis of the employer's and unions' employment decisions may *Hazelwood* be complied with. I think this analysis has not yet been made either by us or by the district court and I would require it now.

V

Evans

If I agreed with the majority as to the construction the defendants wish us to place upon *Evans* and how they wish us to require the district court to apply that case on remand, I might concur in its opinion in that respect. However, I do not read the contentions of the defendants as does the majority, so I think its direction not to apply *Evans* is premature.

Panel Opinion of the Court of Appeals ("Patterson II")

As I read the papers, the defendants seek to apply *Evans* to insulate themselves from liability premised on the pre-1968 practices of job experience seniority of "qualifications," and "canvassing." Opening brief at 19, reply brief at 6. They argue that, since no EEOC charge was filed within 90 days of the 1968 agreement, acts under it are now barred from suit because of § 706(d), 42 U.S.C. § 2000e–5 (d) (since amended). In fact, they seem to argue that because of *Evans* these practices are not relevant to the determination of Title VII liability. See reply brief at 4.

The second point may be disposed of by reference to the paragraph in *Evans* quoted in the margin.[1] Although when the period has run the employer may not be held liable for the discriminatory act, that act still "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." 431 U.S. at 558, 97 S.Ct. at 1889. Thus, it appears the pre-1968 practices of "qualifications" and "canvassing" were admissible evidence, and should not be excluded merely because the limitations period has run.

The first argument of defendants, that they may not be held liable for the "qualifications" and "canvassing" procedures because more than 90 days had run between the cessation of those practices and the institution of the *Patterson* suit, I think, premature at this point. *Evans* applies a statute of limitations, and it is generally accepted that the period will not begin until a cause of action accrues. 54 C.J.S. *Limitations of Actions* § 108. Just because more than ninety

[1] "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences." 431 U.S. at 558, 97 S.Ct. at 1889.

days passed between the cessation of the illegal practices and the filing of the suit is not dispositive; it seems that the causes of action of individual class members affected by those practices will not necessarily have accrued by the time the practices stopped if they had suffered no damage by that time. Accordingly, I think the applicability of *Evans* to the limitations period should be left to the district court on remand, for only then can it be known when the individual causes of action arose.

Deciding now that *Evans* has no application I think premature, just as would be deciding now it had across-the-board application.

En Banc Opinion of the Court of Appeals ("Patterson III")

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1083

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated and Equal Employment Opportunity Commission.

Appellees.

—v—

THE AMERICAN TOBACCO COMPANY, a Division of American Brands, Incorporated,

Appellant,

and

TOBACCO WORKERS' INTERNATIONAL UNION an unincorporated Association; et al.,

Defendant.

No. 78-1084

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellees,

—v—

En Banc Opinion of the Court of Appeals ("Patterson III")

TOBACCO WORKERS' INTERNATIONAL UNION, an incorporated association; LOCAL 182, TOBACCO WORKERS' INTERNATIONAL UNION, an unincorporated association,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Albert V. Bryan, Jr., District Judge.

Argued June 5, 1979. Decided November 18, 1980

Before HAYNSWORTH, Chief Judge, WINTER, BUTZNER, RUSSELL, WIDENER, HALL and PHILLIPS, Circuit Judges, sitting en banc.

Henry T. Wickham (John F. Kay, Jr., Stephen A. Northup, Mays, Valentine, Davenport & Moore, Paul G. Pennoyer, Jr., Arnold Henson, Bernard W. McCarthy, Chadbourne, Parke, Whiteside & Wolff on brief) for The American Tobacco Company, A Division of American Brands, Inc.; Jay J. Levit (James F. Carroll on brief) for Tobacco Workers' International Union and Local 182, Tobacco Workers' International Union; Henry L. Marsh, III (S. W. Tucker, Randall G. Johnson, John W. Scott, Jr., Hill, Tucker & Marsh; Jack Greenberg, Barry L. Goldstein, O. Peter Sherwood on brief) for John Patterson, et al.; Ramon V. Gomez, Equal Employment Opportunity Commission (Abner W. Sibal, General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Assistant General Counsel on brief) for Equal Employment Opportunity Commission.

En Banc Opinion of the Court of Appeals ("Patterson III")

PHILLIPS, Circuit Judge:

In these consolidated Title VII actions brought by EEOC and a class of black employees against American Tobacco Company (American) and Tobacco Workers' International Union (Union) alleging race and sex discrimination in hiring, promotion, transfer and other employment practices, the district court found violations and granted sweeping relief which, with modifications, was then approved by this court upon appeal. *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976). Following entry by the district court of a modified judgment in conformity with our mandate upon remand, the Supreme Court decided *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977); and *Hazelwood School District v. United States*, 433 U.S. 299 (1977). Asserting that these decisions constituted significant intervening changes in the law entitling them to equitable relief from the judgment, American and the Union moved under Fed. R. Civ. P. 60(b) for appropriate relief.[1] The district court denied the motion and this appeal by the defendant-movants followed. It was first heard by a panel of this court which decided that while *Evans* and *Hazelwood* did not entitle the movants to any relief from the judgment, *Team-*

[1] Defendants first moved for relief in this court, seeking a recall of mandate and an order directing the district court to vacate its modified judgment. The recall of mandate was denied on the authority of *Standard Oil Co. v. United States*, 429 U.S. 17 (1976), as not requisite to district court consideration of the motions for relief. Jt. Supp. App. 2, 3. Defendants then moved in the district court that the modified judgment be vacated and the complaints dismissed on the basis of the intervening decisions. While the motions did not identify the rule under which they were made, they are most appropriately treated as motions under Fed. R. Civ. P. 60(b)(5) for relief from a judgment certified as final for purposes of appeal under Fed. R. Civ. P. 54(b). Jt. App. 183-84.

sters might, and that remand for further proceedings in light of *Teamsters* was required. *Patterson v. American Tobacco Company*, 586 F.2d 300 (4th Cir. 1978).

Upon rehearing by the court *en banc*, we conclude that the decision in *Evans* did not entitle the defendants to any relief from the judgment but that the decisions in both *Teamsters* and *Hazelwood* may require relief whose specific form can only be determined by further proceedings in the district court. Accordingly we affirm in part and vacate and remand in part for further proceedings.

I

The factual background and protracted procedural history of these cases is adequately set out in our earlier opinion, 535 F.2d 257, and in the panel opinion withdrawn upon our *en banc* rehearing of the instant appeals, 586 F.2d 300. It need not be repeated in full here; specific details necessary to our discussion will suffice.

By way of general background, the essential features of the modified judgment from which relief by motion is now sought are here summarized. Based upon findings of violations by the defendants in transfer and promotion practices affecting non-supervisory employees and in the procedures by which supervisory employees were appointed, the judgment required American to: (1) post more definite written job descriptions when vacancies occurred; (2) eliminate lines of employment progression in six of nine job categories; (3) permit blacks in the prefabrication department in one branch to transfer to jobs in the fabrication department at another branch without losing seniority despite American's long-standing policy disallowing inter branch transfers with retention of company seniority; (4) make back-pay awards to employees unlawfully denied promo-

tions; and (5) develop and apply objective criteria for appointing supervisory personnel. Reserved for judgment and still pending for determination in the district court were the individual claims for restitutionary back pay awards.

The defendants contend that the cited Supreme Court decisions require relief in various ways from the further enforcement of the judgment. We consider the effect of each decision in order.

II
Teamsters

Defendants contend that *Teamsters* draws in question the continued validity of those portions of the challenged judgment finding American's branch seniority system and its job lines of progression policy violative of § 703(a) of Title VII and granting related relief. The branch seniority system[9] was found violative on the basis that by imposing, without justification of business necessity, loss of seniority upon employees transferring from the lower paying prefabrication department of one branch to the higher paying fabrication department of another branch, blacks and women had been effectively locked into the lower paying positions. 535 F.2d at 263-64, 271. The lines of progression policy was found violative of Title VII in respect of six of nine protected job lines because of its demonstrated disparate impact upon protected employees and the failure to show its justification by any business necessity. *Id.* at 264-65, 271.

The contention is that *Teamsters* has now revealed that both the branch seniority system and the job lines of progression policy are immunized against challenge by § 703(h) of Title VII because they are, within contempla-

[9] Frequently alluded to by the litigants as the "plantwide seniority system," essentially to distinguish it from the earlier departmental system that it supplanted in 1963.

tion of that section, "bona fide" seniority systems. We conclude, that under *Teamsters* the branch seniority system must be held immune if bona fide within the meaning of § 703(h), and that this presents a factual issue requiring reconsideration by the district court. We further conclude that § 703(h) as interpreted in *Teamsters* has no application to the job lines of progression policy, so that no reconsideration of the finding of violation or of the relief granted in relation to this policy is required by *Teamsters*. Our reasons follow.

In pertinent part, § 703(h) provides that

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . ., provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(h).

When the original judgment was entered, affirmed on appeal and modified on remand, the view in this and other Circuits was, as expressed in *United States v. Chesapeake & Ohio Railway*, 471 F.2d 582, 587 (1972), that, notwithstanding § 703(h), "seniority systems which perpetuate past racial discrimination violate [Title VII]."

Teamsters expressly rejected that view, finding it belied by the legislative history of § 703(h) and holding instead that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination," 431 U.S. at 353-54. In holding the *Teamsters* seniority system immune under § 703(h), the Court emphasized that by literal terms of the statute a system's immunity depends upon its being "bona

fide," and specifically pointed to the statutory requirement that differences in treatment flowing from the system's application not be "the result of an intention to discriminate because of race." *Id.* at 353.

Because the bona fides of the *Teamsters* system was conceded, the *Teamsters* Court was not, however, required to give detailed attention to the criteria by which bona fides in a contested situation is now to be determined. The Court did point out that the system before it "did not *have its genesis* in racial discrimination, and . . . was negotiated and [had] been maintained *free of any illegal purpose.*" *Id.* at 356 [emphasis supplied]. Also emphasized were the facts that the system was facially neutral, applying alike to all employees, equally discouraging all from making intra-company transfers involving loss of seniority; and finally that the differences in employment conditions imposed by the system had a rational basis in the practices of the affected industry and were consistent with National Labor Board precedents. *Id.* at 355-56.

From this it is clear that the modified judgment in this case was entered under a misapprehension on the part of both the district court and this court as to the proper application of § 703(h) to claims of Title VII violation through the operation of seniority systems. At odds with our then understanding[,] lack of bona fides may not be rested solely upon a finding of perpetuation of pre-Act discrimination. *See Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978). Defendants are accordingly entitled to relief from that judgment to the extent the present or a reopened record shows that the "seniority system" therein found violative of Title VII is immune to challenge because "bona fide" within contemplation of § 703(h).

By their motions in the district court, the defendants con-

tended that both the branch seniority system and the lines of progression policy were now revealed to be immune under § 703(h) because their bona fides was manifest on the record. The district court, without differentiating between the two and apparently treating them as constituting together "the seniority system" in issue, held flatly that

> the seniority system of the defendants in this case is not a bona fide system under [*Teamsters*] not merely because it perpetuated Pre-Act discriminatory practices . . . but because this system operated right up to the day of trial in a discriminatory manner. [*Teamsters* citation omitted]. This system had a discriminatory genesis. [*Teamsters* citation omitted] The background of labor relations of this Company and the seniority system clearly shows this to be true. The record in this case clearly supports this finding.

Defendants, of course, challenge that conclusion. Because we consider that application of § 703(h) to the branch seniority system and to the lines of job progression policy respectively presents separate questions dictating different results, we take them up separately.

A.

We first conclude that § 703(h) simply has no application to American's job lines of progression policy, whether or not it be considered a "seniority system" in the mode of its operation.[3] This policy was not in effect at American in

[3] Plaintiffs have contended that 703(h) has no application to the job lines of progression policy because, as administered, the policy was not a seniority system within contemplation of § 703(h). Without challenging the proposition that the job lines of progression *may* constitute a 703(h) seniority system, *see Teamsters*, at 355 & n.41, the contention is that the only seniority system in effect at American was the plantwide (branch seniority) system; that it alone determined progression even within the job lines of progression

1965 when Title VII went into effect, but was only adopted in January 1968 in connection with American's general revision of its promotional policies. 535 F.2d at 263.[4]

We think that the legislative history of § 703(h), as exhaustively analyzed by the Supreme Court in *Teamsters* and

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adopted in 1968, there being no superimposed seniority system integral to this separate policy. Plaintiffs seek and find considerable support for this position in various formal representations made by American in this litigation that the job lines of progression policy was operated entirely on a plantwide seniority basis. This was not, however, a factual issue directly litigated in the case and the record as presently composed is ambiguous on it. In view of our stated basis for deciding that 703(h) has no application to seniority systems instituted after the effective date of Title VII, we need not address this as a possible alternative basis for decision.

[4] Judge Widener's dissenting opinion challenges this factual assertion, contending that this policy was demonstrably in effect prior to the effective date of Title VII in 1965. With all respect for his exhaustive search of the evidentiary record and for the fruits of that search in which he finds support for his challenge, we simply disagree with the inferences he draws and perhaps with the legal implication he derives from those inferences.

Without attempting here an exhaustive counteranalysis of the factual record, our perception is that while the informal rudiments of what is now described as a "job lines of progression policy" certainly existed before 1965, the stated procedures adopted by American in 1968 to control entry into and promotions within specifically identified job "lines" involved enough of change and formalization (whether in favor of or against employee interests) to constitute a *new* policy, or at least one so radically altered from prior unstructured procedures that it could not be considered simply a "routine application," *see Teamsters*, 431 U.S. at 352, of those pre1965 procedures. As indicated in text of this opinion, we construe § 703(h) as a quite narrow exception to Title VII's general coverage of all "conditions of employment," including of course promotional policies, the prime subject of all types of seniority systems. In line with that narrow interpretation, we consider that "routine application" should be given a stringent reading against any employer seeking the special insulation provided by § 703(h) for any seniority "system" alleged to have been in place when Title VII was enacted. On that basis, we conclude, as a panel of this court has long since assumed—without intervening challenge of fact or law—that within contemplation of § 703(h), the job lines of progression policy here in question only came into existence in 1968.

in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), conclusively demonstrates that Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act applications of such systems. *See Teamsters*, 431 U.S. at 352. That history is replete with indications that the interests sought to be protected by this special exception to Title VII's general coverage of all "conditions of employment" were those seniority rights already vested in incumbent workers when Title VII went into effect.[8]

[8] The applicability of § 703(h) to seniority systems initiated after the effective date of Title VII was not decided by *Teamsters*. *See* Note, 52 Tul. L. Rev. 397, 405 (1978). The EEOC position is that § 703(h) has no applicability to seniority systems not in operation at the effective date of Title VII. EEOC Notice N-915 (July 14, 1977), *reprinted in* EEOC Compliance Manual ¶ 6500. We need not here embrace in its entirety this EEOC interpretation of *Teamsters* to agree that the legislative history suggests that post-Act seniority systems were not intended to be included in the protection of § 703(h). A memorandum prepared by Senators Clark and Case stated in explanation of the intended effect of this section that "Title VII has no effect on established seniority rights." 110 Cong. Rec. 7213 (1964). The Justice Department noted that "Title VII would have no effect on seniority rights existing at the time it takes effect." *Id.* at 7207. In discussing this legislative history, the Supreme Court noted in *Teamsters* that Title VII would allow "full exercise of seniority accumulated before the effective date of the Act," 431 U.S. at 352, and that Congress did not intend to punish employees by destroying their "vested seniority rights . . . simply because their employer had engaged in discrimination prior to the passage of the Act," *id.* at 353. The question of the application of § 703(h) to seniority systems initiated after 1965 was not present in *Teamsters* and apparently has not been authoritatively addressed subsequently. Considering that Title VII is a broad remedial statute, we believe the legislative history supports the view that only those bona fide seniority systems in operation when Title VII took effect are entitled to the protection of § 703(h). Systems initiated in the post-Act period must of course pass muster under the *Griggs* analysis in the same manner as other facially neutral policies or practices challenged as discriminatory in their consequences. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Because § 703(h) has no application to this policy, its discriminatory effect was properly assessed by the district court under the general disparate impact test laid down in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The violation then found under that test and the related relief given having been affirmed by this court, 535 F.2d at 264-66, defendants are entitled to no relief from those portions of the judgment related to American's job lines of progression policy.

B.

There is no question that if American's branch seniority system is bona fide within contemplation of § 703(h) as interpreted in *Teamsters*, defendants are entitled to relief from those portions of the judgment related to inter-branch transfers. This system, unlike the lines of progression policy, was in effect when Title VII went into effect, and seniority rights were then vested under it. Opening up inter-branch transfers to protected groups of employees without loss of their branch seniority indubitably impinges retroactively upon seniority rights already vested at the critical time in employees in the transferee branch. It is this that is forbidden by § 703(h), so long as the seniority system is "bona fide." 431 U.S. at 348-55.

We turn now to the fact that the district court in ruling on the 60(b) motion expressly concluded that in light of *Teamsters*, American's seniority system was not bona fide. Implicit in that conclusion, earlier quoted, was the district court's understanding that, under *Teamsters*, American's branch seniority system would not be bona fide if it either "had its genesis" or was thereafter "maintained" for an illegally discriminatory purpose. We agree that this is *Teamsters* teaching. *Id.* at 356. However, we do not think that the record before the district court when it ruled upon

the motion justified its specific conclusion that the system was not bona fide under this test. Certainly there are not in the record before us express findings of fact that would support such a conclusion. Whether there is evidence sufficient to support the requisite findings of fact is doubtful in view of the understanding of § 703(h)'s application that reigned in this Circuit when the original record was being made. In consequence, the present record does not permit us to conduct a principled review of the district court's ruling on this point. *See Schneiderman v. United States*, 320 U.S. 118, 129-30 (1943); *Kelley v. Everglades Drainage District*, 319 U.S. 415, 421-22 (1943); *Knapp v. Imperial Oil & Gas Products Co.*, 130 F.2d 1, 3-4 (4th Cir. 1942).

Because the issue of the branch seniority system's bona fides only emerged in its present contours after the original record was made, we conclude that the relief invoked by defendants under 60(b) can only be achieved by reopening the record for additional proof and a new determination of bona fides in light of *Teamsters*.*

III
Evans

Evans held that Title VII was not violated by an employer's failure to grant retroactive seniority under its bona fide seniority system to a rehired employee who had not filed timely charges with EEOC following her earlier discriminatory discharge. Defendants here contend that *Evans* draws in question the continued validity of the district court's judgment to the extent it finds violations of Title VII and grants relief related to defendants implementation of its 1968 promotional system, because no timely challenge to that system was filed with EEOC when the system was

* For guidance in addressing the issue the district court may find helpful the Fifth Circuit's decision in *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 350-53 (5th Cir. 1977).

adopted. We conclude that *Evans* is inapposite to the facts of this case and hence requires no modification or reconsideration of the judgment.

In *Evans* the Court specifically rejected the employee's claim that the failure to accord her retroactive seniority benefits constituted a "continuing violation" that was not time-barred. Rejection was on the basis that the seniority system itself was not charged or proven to constitute an *existing* violation of the claimants' rights to nondiscriminatory conditions of employment. In the instant case, by contrast, the violations charged and found by the district court were "continuing" in the very sense not present in *Evans*. Here the promotional policies adopted in 1968 were alleged by the claimants, found by the district court, and affirmed by this court to involve a continuing pattern or practice of discrimination that locked black and women employees into less favorable job positions. These effects, unlike the denial to the *Evans* claimant of retroactive seniority benefits, constitute truly "continuing" violations of Title VII. Hence, claims related to these violations are not barred by failure to have challenged at its inception the policy which gave continuing rise to them.

IV
Hazelwood

Defendants contend that *Hazelwood* undercuts the basis upon which discrimination was found in appointments to supervisory positions at the Richmond and Virginia branches, and that they are accordingly entitled to relief from related portions of the judgment. While we do not believe that *Hazelwood* requires full relief from the judgment on the present record, we conclude that it does require remand for reconsideration.

Hazelwood made two critical clarifications in Title VII

doctrine that might significantly have affected the district court's original assessment of the evidence, its resulting judgment, and this court's initial review of that judgment. The first has to do with the relevant time period within which discrimination is to be assessed; the second, with the assessment of statistical proof in respect of jobs claimed by the employer to require special qualifications or skills. For reasons that follow, we conclude that the judgment under attack is not supportable on the present record under a fair application of these principles from *Hazelwood,* and that their proper application can only be insured by reconsideration of the evidence related to the supervisory positions on a reopened record in the district court.[7]

The district court's original finding of discrimination in appointments to the supervisory positions was based entirely upon plaintiff's statistical proof. This showed substantial current disparities between the percentages of blacks and women in the general population of the Richmond SMSA[8] and those employed in supervisory positions by American in its Richmond and Virginia branches[9] and, again, between the percentages of black and women employees in lower level positions at American and those employed in supervisory positions by American in its two branches. Taking into account that the supervisory positions had been filled partially by hiring from outside and partially by promotion and transfers from within American's work force, the district court concluded that a violation of Title VII in filling these positions had been established by plaintiff's statistical

[7] See note 1 *supra.*

[8] There is no dispute that the appropriate geographical area from which to draw base statistical data is that defined by the Richmond SMSA.

[9] This excludes any consideration of the special case of the Richmond office which, with only four or five post-Act vacancies involved, is not in issue on this appeal.

proof. The district court considered but was unpersuaded by defendants' statistical evidence offered to rebut plaintiff's prima facie case. That evidence consisted of two elements favoring defendants' position that were then and now contended to be more probative on the issue than plaintiff's statistical evidence: statistical data showing the percentages of women and blacks categorized as "supervisors" in the SMSA figures compared with the percentages of blacks and women employed in supervisory positions at American; and statistical data showing the overall course of American's appointments to vacant supervisory positions since the effective date of the Act.

While the record is not wholly clear on the point, we are persuaded that the district court gave little, if any, consideration to these elements of defendants' proof, presumably for the very reason that *Hazelwood* had not then made plain their great importance in assessing proof of discrimination in this type case. Our reasons for this conclusion require brief analysis of *Hazelwood*'s specific teaching on the relevant issues and of the district court's order denying the Rule 60(b) motion.

As we recently pointed out in *EEOC v. Radiator Specialty Co.*, ____ F.2d ____ (4th Cir. Nov. 15, 1979) (slip op. at 17), *Hazelwood* and its recent progeny have now confirmed the inappropriateness in the usual case of using general population and general work force statistics as base data for establishing discrimination in respect of hiring and promoting to job positions requiring special qualifications "not commonly possessed or readily acquired." In the instant case, it seems obvious that in the pre-*Hazelwood* setting both the district court in entering original judgment and this court in review simply assumed the appropriateness of using plaintiffs' general population and general work force statistics as the base data for comparison with American's employment

of blacks and women in supervisory positions. On the district court's part this may have been because it rejected American's contention that special qualifications existed. If so, the record does not indicate that this was the basis for the court's reliance upon plaintiffs' statistics, nor would such a conclusion have been supported on that record. The question whether special qualifications in the *Hazelwood* sense did or did not exist for these positions could not be resolved as a matter of law on the basis of the opposing parties' bald conflicting assertions, nor by looking simply to the manifest nature of the positions, but required a factual inquiry whose necessity was not then realized. *See EEOC v. Radiator Specialty Co.*, ____ F.2d at ____ (slip op. at 14-16). That factual inquiry is required now to assure compliance with *Hazelwood*'s teaching on the appropriate use of statistical evidence to establish and to rebut a prima facie case of discrimination.

It is equally obvious that the district court and this court in the pre-*Hazelwood* setting failed to assess the evidence with appropriate regard for the relevant time period for inquiry as that too has now been clarified in *Hazelwood*. Basically, *Hazelwood* teaches on this point that the relevant period commences no earlier than the effective date of the Act.[10] This has two critical consequences. It makes irrelevant to the establishment of a prima facie case any evidence, including statistical data, related to pre-Act employment acts.[11] Perhaps more critically, it permits an employer effectively to rebut a prima facie statistical showing of discrimination in a current, static employment situation by showing

[10] Under *Evans*, of course, the beginning of the relevant time period may be at later times set by limitation periods for charging violations.

[11] Except for the limited purpose of proving inferentially the continuation of pre-Act discrimination into the post-Act time period. *See Hazelwood*, 433 U.S. at 309 n.15.

that within the critical post-Act time frame its employment acts have been non-discriminatory. Thus, an "employer who from [the effective date of the Act] forward made all its employment decisions in a wholly non-discriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes." 433 U.S. at 309.

In considering on the 60(b) motion whether *Hazelwood* required relief from the judgment, the district court took the view that its only possible relevance was "on the question of whether the defendant should have been allowed to put on evidence to rebut the plaintiffs' prima facie case." As to this, the court pointed out, the defendants had been "allowed and they did, put on a substantial amount of evidence in an unsuccessful attempt to rebut the prima facie case." Therefore, the court concluded, "*Hazelwood* . . . is inapplicable to these cases." Jt. Supp. App. at 23. As our discussion has indicated, *Hazelwood* goes well beyond simply authorizing the presentation of rebutting proof by an employer, and touches in critical ways upon the appropriate mode of assessing the total proof adduced by both sides. Our review of the record, including of course the district court's expressed perception of *Hazelwood*'s impact, persuades us that reconsideration of the evidence on a reopened record is required in order fairly to determine whether the judgment can stand in light of *Hazelwood*.[12]

As earlier indicated, it is clear in the first place that the

[12] The possibly decisive force of defendants' proof of post-Act appointments if properly considered under *Hazelwood*'s teaching is exhaustively explored in Judge Widener's opinion dissenting from the withdrawn panel opinion in this appeal. 586 F.2d at 306-10. Without attempting prejudgment of the matter, we draw attention here to that analysis merely to emphasize our conviction that *Hazelwood*'s impact may not have been fully appreciated by the district court in ruling on the Rule 60(b) motion.

question of special qualifications for the supervisory positions must be determined as a prelude to proper assessment of the statistical evidence. If it is determined that no special qualifications beyond those commonly possessed or readily acquired are involved, then general population and work force statistics within the relevant time period may appropriately be used to determine whether plaintiffs' evidence of record establishes a prima facie case.[13] If it is determined that special qualifications in this sense do exist, then the most probative evidence will be qualified market data,[14] and

[13] This will require a rough break-out of appointments by hiring from those by promotions (or transfers) from within American's work force. The relevant labor pool for assessing discrimination in promotion practices consists of qualified lower level employees. *E.g., Hill v. Western Electric Co.*, 596 F.2d 99 (4th Cir. 1979).

[14] While we have earlier noted the possibly decisive force of SMSA statistics as the appropriate qualified market data, see note 12 *supra*, the question of their actual appropriateness will itself require analysis by the district court. Defendants contend that we have already decided their appropriateness by stating in our original panel decision that they provided a "more realistic measure of the company's conduct than the gross percentage of blacks and women in the whole work force." 535 F.2d at 275. This was said, however, in the context of an evaluation of the propriety of the district court's remedial order. The question of their appropriateness for determining liability in the first instance is an open one on the present record. The SMSA statistics give the percentages of blacks and women in the Richmond area who are employed in jobs denominated as "supervisory" in the total labor pool there analyzed. Whether these percentages substantially reflect the percentages of persons in that pool "specially qualified" for American's particular supervisory positions is not manifest on the present record.

Until the actual nature of any special qualifications required for American's positions is determined in some factual detail, the probative force of the SMSA data will not be apparent. In any event, plaintiff is not absolutely required to produce evidence of the actual percentages of specially qualified blacks and women in the relevant labor pool in order to make out a prima facie case. Other data, *e.g.*, applicant-flow statistics, may be "very relevant," *Hazelwood*, 433 U.S. at 308 n.13, though this has to be carefully assessed in light of the particular situation in issue. *See Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977).

general population and work force data may be found not appropriate as the basis for statistical comparison.[18] In the latter event, plaintiffs should be allowed on the reopened record to adduce any evidence of qualified market data available to them. *See EEOC v. Radiator Specialty Co.*, ____ F.2d at ____, ____ (slip op. at 15-18).

Next, in assessing defendants' rebutting evidence, whether on the present or a reopened record, proper weight must be accorded its tendency to show nondiscrimination in post-Act employment decisions, notwithstanding the inference of discrimination permissible under *Griggs* from plaintiffs' statistical proof of a prima facie case. In order fairly to assess defendant's effort at rebuttal, it would seem necessary to establish on a reopened record the details of the relatively small number of post-Act appointments (apparently around 30 in number) to supervisory positions: the approximate dates when vacancies were filled, the race and sex of each appointee, and whether appointment was by promotion from within or hiring from without. Only so can a valid statistical comparison within the relevant labor pool be made.

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[18] *Hazelwood* did not entirely rule out the use of general population and general work force statistics in "special qualification" cases, simply pointing out that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population . . . *may* have little probative value." 433 U.S. at 308 n.13 [emphasis supplied]. The question remains whether under the circumstances of a particular case the statistical proof offered justifies the inference on which the prima facie case rests. Our own post-*Hazelwood* cases have made it plain, however, that where special qualifications are found to exist, general population and work force statistics will not normally suffice as the base data for establishing a prima facie case. *See EEOC v. Radiator Specialty Co.*, ____ F.2d ____ (4th Cir. Nov. 15, 1979); *Hill v. Western Electric Co.*, 596 F.2d 99 (4th Cir. 1979); *EEOC v. Chesapeake & Ohio Railway*, 577 F.2d 229 (4th Cir. 1978).

V

For these reasons, the order of the district court denying on their merits the motions of American and the Union for relief under Fed. R. Civ. P. 60(b) is affirmed in part and vacated and remanded in part for further proceedings consistent with this opinion.

Affirmed in part;
Vacated and Remanded
in part.

En Banc Opinion of the Court of Appeals ("Patterson III")

WINTER, Circuit Judge, concurring and dissenting:

I concur in the majority opinion of the in banc court with respect to its treatment of the *Teamsters* and *Evans* issues both for the reasons set forth therein and the reasons expressed in the majority panel opinion, Patterson v. American Tobacco Company, 586 F.2d 300 (4 Cir. 1978) (Patterson II). I dissent from the majority's application of the *Hazelwood* principles to the instant case and from the remand for further proceedings under *Hazelwood* both for the reasons expressed in the majority panel opinion and those that follow. In my view the present record conclusively shows that the requirements of *Hazelwood* have been amply met. American has had at least one opportunity to demonstrate otherwise. It did not avail itself of that opportunity and the court should proceed to final disposition without further delay.

I

I agree that under *Hazelwood* an employer may successfully rebut a plaintiff's prima facie case, which plaintiff established by proving that the percentages of women and blacks employed as supervisors is disproportionately low to the percentages of women and blacks in the available labor pool, by showing that the percentages of women and blacks categorized as "supervisors" in the SMSA figures compared favorably with the percentages of blacks and women employed in supervisory positions by the employer. But, as I understand the law, resort to the "supervisors" statistics in the SMSA figures is predicated upon a showing by the employer that the supervisory positions require special qualifications *"not commonly possessed or readily acquired"* by the general labor force. EEOC v. Radiator Specialty Co. ____ F.2d ____, ____ (4 Cir. 1979) (emphasis added). If such a showing is not made, the appropriate statistics to be con-

sidered are those of the available labor force. I also agree that *Hazelwood* teaches that the relevant period for determining discrimination in hiring or promotion is not earlier than the effective date of the Title VII (July 2, 1964). [*sic*]

On the question of the statistics to which the court should turn to decide if plaintiffs' prima facie case was rebutted, I think that the stipulation of the parties, made June 24, 1974, supplies the answer. The parties stipulated:

> 56. Prior to selecting an employee for promotion to a supervisory position the defendant Company gives the local union an opportunity to make recommendations.
>
> 57. The defendant Company has never had an educational requirement for employees promoted from hourly production jobs to supervisory positions.
>
> 58. Hourly employees of the defendant Company do not have to apply or express their interest in holding a supervisory position in order to be considered for promotion to such a position.
>
> 59. The defendant Company does not have any written guidelines which are used in selecting supervisory personnel.
>
> 60. The selection of supervisors at the Richmond and Virginia Branches of the defendant Company is left to the discretion of those employees at the superintendent and manager levels of plant management.

I would think it obvious that if American permits a union to nominate candidates for promotion, if it imposes no education requirement for employees promoted from hourly production jobs to supervisory positions, if it does not require a showing of employee interest as a condition of promotion and if it has no written guidelines for selecting supervisory personnel, relying instead on the unbridled discretion of higher supervisory personnel, there is no requirement that

employees hired for supervisory positions possess skills or special qualifications not commonly possessed or readily acquired. Even if, as the majority speculates, the district court simply assumed the appropriateness of using general population and general work force statistics as the base data for comparison with American's employment of blacks and women in supervisory positions, that assumption was manifestly correct. Irrespective of whether the district court in its original decision or in its decision on remand articulated the reason for its result with the legal nicety that the majority would prefer, I see no point in returning the case.

It should be remembered also that, while the district court was reconsidering its decision on remand, *Hazelwood* had been decided. Our direction to the district court gave American full opportunity to tender proof of the special qualifications which it believed that it was necessary that its supervisory personnel possess.[1] American failed to offer any evidence other than that already contained in the record. Instead it stated to the district court both in writing and in the oral statements of counsel that the present record was sufficient and the issue to be decided was purely legal. Moreover, before us, American relies on SMSA statistics which have little relevance to the tobacco industry; namely, statistics derived from construction craftsmen, mechanics and repairmen, machinists, metal craftsmen, and other craftsmen. Thus from lack of proof of the need for special qualifications, despite an opportunity to offer such proof, and general inappropriateness of the statistical data asserted to

[1] The actual sequence of what transpired was that after we decided Patterson II defendants moved us to recall the mandate and to reconsider our decision in the light of, *inter alia*, *Hazelwood*. In denying the motion, we stated in our order that "[t]he parties may present Court cases . . . and they may offer such supplementary evidence as to the district court all questions of law arising out of recent Supreme may be pertinent . . ."

support American's position, I would conclude that the only relevant evidence on the factor in question is the stipulation of the parties which, as I have shown, established that special qualifications are not required. Since there was no necessity of special qualifications, the correctness of the district court's factual determinations is unimpeached and there is no need for a second remand.

II

I also see no need to remand for a consideration of post-Act employment decisions for, as I view the record, under any test plaintiffs' prima facie case was not rebutted.

During the post-Act period to the date of trial, American hired or promoted approximately 85 persons to supervisory positions at the Virginia and Richmond branches, 55 at Virginia and 30 at Richmond.[2] Of this number, 34% (27) were promoted and the rest were hired from the outside. At the Virginia branch, 6 of the 55 supervisory appointments were of blacks—10.8% of the total supervisory appointments. At the Richmond branch, 3 out of 30 supervisory appointments were of blacks—10% of the total supervisory appointments. Both of these figures are below the percentage of blacks in even the Richmond SMSA supervisory workforce (12%), and more markedly so with respect to the proportion of blacks in the overall workforce (23.6%).[3]

[2] The majority in banc opinion refers to the number as being approximately 30 in number. Presumably this statement is based upon the district court's finding that "at least" 18 and 9 persons were hired or promoted to supervisory positions at the Virginia and Richmond branches, respectively. But the district court in later findings found that from January 1, 1963 to June 1, 1973 there have been over 55 and 30 vacancies in the assistant foreman position at the Virginia and Richmond branches, respectively, and since 1966, 4 vacancies in the position of supervisor in the Richmond office.

[3] For the reasons set forth in Part I of this opinion, I would deem as the appropriate measure the proportion of blacks in the overall work force (23.6%).

Thus, to me, the evidence of post-Act hirings and promotions to supervisory positions confirms and does not rebut the plaintiff's prima facie case of racial discrimination in post-Act recruitment of supervisory personnel.

There is further support for this conclusion in an analysis of the appointment dates of the black supervisors. Of the 9 black supervisors at the Richmond and Virginia branches at the date of trial, 5 were not made supervisors until *after* January 3, 1969, when EEOC charges were filed. Since one black supervisor had been appointed prior the effective date of Title VII, this means that American voluntarily appointed only 3 black supervisors during the period that its compliance with the law is to be measured.

III

In the light of my views, it could be asked why I do not join in the majority in banc opinion since I agree that remand under *Teamsters* is required and the record is such that plaintiffs will prevail on both issues on remand under *Hazelwood*. The short answer is that this litigation has proceeded at a regrettably slow pace to date. The ultimate relief to those of the plaintiffs entitled to back wages has long been denied. Conversely American has been afforded a full and fair opportunity to show how *Hazelwood* should change the course of this litigation and it has failed or been unable to meet the burden resting on it. I do not think that the ultimate decision in this case on any issue should be delayed any longer than is absolutely necessary. Since I see no viable issue under *Hazelwood*, I would not complicate the remand by interjecting this issue.

Judge Butzner authorizes me to state that he joins in this opinion.

En Banc Opinion of the Court of Appeals ("Patterson III")

WIDENER, Circuit Judge, concurring and dissenting:

I

I concur in the result reached by the majority in part II-B of its opinion, as well as in part IV thereof.

II

As to part III of the majority opinion concerning the application of *Evans*, I respectfully dissent for the reasons I have stated in my dissenting opinion at 586 F2d page 310.

III

I respectfully dissent to part II-A of the majority opinion for the reasons I will set out below.[1]

The lynchpin of the majority's holding, that § 703(h) has no application, is this statement found on page 10 of the slip opinion:

> "This policy [lines of progression] was not in effect at American in 1965 when Title VII went into effect, but was only adopted in January 1968 in connection with American's general revision of its promotional policies, 555 F.2d at 263."

[1] I would not find it either necessary or appropriate to make the majority's holding that § 703(h) only applies to seniority systems in existence on the effective date of the Act, although I note that the statutory language and legislative history do not require this holding. The Supreme Court has specifically noted in *Teamsters* that § 703(h) on its face immunizes all bona fide seniority systems. 431 U.S. 348, n. 30. Although § 703(h) is written as an exception and not as a grandfather clause, the majority simply transforms an ordinary exception into just that. Congress undoubtedly knows how to write a grandfather clause if it wishes, but in this case wrote an exception instead. New plants, for instance, are summarily excluded from § 703(h) in the majority view, without stated justification.

I have read page 263 of that opinion from beginning to end, and, with respect, cannot read into it the meaning given by the majority which I have just quoted. Indeed, that opinion indicates, if anything, the lines of progression were in existence at least as early as 1963. 535 F2d at 271. I think the source of the majority's statement is more likely an uncritical acceptance and erroneous interpretation of stipulation 38 filed in the district court, to which I will later allude. In all events, without the accuracy of the quoted statement, the opinion of the majority, that § 703(h) has no application, is without foundation. I think the record is uncontradicted and compelling that the factual statement is demonstrably wrong.

In this case, the pretrial discovery, the trial, and the district court's decision all occurred prior to the Supreme Court's decision in *Teamsters*. Therefore, it was not material whether or not the lines of progression existed prior to 1965 (the effective date of the Act). It is thus not surprising that the district court's findings of fact do not address this issue directly and can be read in two ways.[3] The majority today

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[3] The district court's stipulation 38 states that a posting and bidding system was instituted in 1968, and that there were exceptions for nine named lines of progression. It does not state whether the lines already existed in 1968 or whether the lines were created in 1968. In light of the full record, the former interpretation is clearly correct. The stipulation reads in full:

> 38. On January 15, 1968, the defendant Company instituted a system (which is still in effect) whereby permanent vacancies in classifications under the jurisdiction of Local 182 of the T.W.I.U. at both the Richmond and Virginia Branches were filled through job posting and employee bidding. Under this system, all such vacancies are posted on plant bulletin boards for seven working days. Anyone in the bargaining unit may sign any posting (bid on any job) with the exception of postings for vacancies in the adjuster, learner adjuster, examiner-making, examiner-packing, and dryer operator, textile dryer operator, overhaul adjuster-making or packing, and turbine operators

simply assumes the lines of progression were created in 1968. Not only is this assumption not correct, but the full record clearly demonstrates that in 1968 lines of progression were *eliminated*, except for the nine lines at issue here which already existed and which were merely acknowledged as pre-existing exceptions to the posting and bidding system. On remand, the district court should if necessary take additional evidence, and in all events issue findings of fact on the origins of the lines of progression.

The full record, even as it now stands, is replete with evidence that the lines of progression existed for many years prior to the effective date of the Act.[8] The Company did not, and still does not, use the terminology "lines of progression." The Company does use the term "qualifications" to describe what are in fact lines of progression; that is, one became "qualified" for a job at the top of the line by first holding a job nearer the bottom of the line. The district court found as a fact that both prior to and after the effective date of the Act, job qualifications "referred to whether or not an employee had filled a particular job before and was in the opinion of supervisory personnel, familiar with it." Finding of Fact Number 8. (Appendix II 8 EPD, ¶ 9722, p. 6012, E.D. Va. 1974.)

Of plaintiffs' First Interrogatories to Defendant American Tobacco Company, interrogatory number 7 calls for an explanation of "the basis or rationale for each line of progression . . . and each change therein described in answer to

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classifications at the Virginia Branch and adjuster and learner adjuster at the Richmond Branch.

What this opinion refers to as stipulation 38 is actually paragraph 38 of stipulation 1. Other numbered stipulations referred to are the numbered paragraphs of stipulation 1.

[8] A search of the 52 volume record reveals no evidence to the contrary.

interrogatory 6. . . ." (Record, v. I, p. 47, 50-51.) The answer refers to a list of jobs "with qualifications other than seniority." The answer goes on to explain:

> This means simply that an individual has to bid for, and qualify on, the lower paid job first in each case before that person may bid for, and qualify on, the higher paid job. The criterion for requiring these "qualifications" is based squarely on the necessity of learning the first job before being able to adequately perform the next one even after the regular training period.
> (Record, v. I, p. 287.)

The list of jobs referred to (which became Plaintiffs' Exhibit 35M) is titled "EXPLANATIONS OF CLASSIFICATIONS WITH QUALIFICATIONS OTHER THAN SENIORITY IN ANSWER TO QUESTION 7." The list then describes each line of progression (Learner Adjuster to Adjuster, Operator to Learner Adjuster, Catcher to Examiner-Making, etc.) and gives a detailed explanation of the rationale for each one. It is beyond question that the Company used "qualifications" as a synonym for lines of progression.

Interrogatory 6, referred to in interrogatory 7 (see *supra*), reads in relevant part:

> 6. Describe in detail all changes in the composition or structure of departments and lines of progression, or in any job, including the creation, elimination, merger, or restructuring of any department, line of progression or job which occurred between January 1, 1960 and the date these interrogatories are answered.
> (Record, v. I, p. 50.)

American's answer was dated July 26, 1973:

> 6. The significant changes in departments patterns of movement (sic), etc., which have taken place since January 1, 1960, are as follows:

En Banc Opinion of the Court of Appeals ("Patterson III")

* * *

(b) *The elimination of qualifications* (except as noted in answer to question 5) with the establishment of seniority as the sole criterion for permanent promotion to be effected through the posting and bidding system in the contract of 1968 as agreed between the company and the Union.

(c) . . . By 1968 the Company and the Union negotiated *the elimination of qualifications* except in the few jobs mentioned in answer to Question 5.

(Record, v. I, p. 269-270)[4] (italics added).

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[4] Similar interrogatories were put to the defendant unions. The local and the international provided separate answers, all of which are not illuminating. Plaintiffs' First Interrogatories to Defendant Unions, (Record, v. I, p. 30), includes interrogatory 23 (*Id.* p. 37):

> 23. State whether American Tobacco and defendant have entered into any agreements which in any way altered, restructured, rearranged or merged the lines of progression in any of the departments or units utilized by the Company for organizing its employees by jobs performed. If so, . . . [state] the dates of the agreements.

Defendant Local No. 182's Answers to Plaintiffs' First Interrogatories (Record, v. I, p. 95, 98) states:

> 23. See attached copies of contracts. Chief negotiators for both sides shown in back of attached contracts. Dates of agreements also shown. Dates of negotiations not known.

The Defendant Tobacco Workers International Union's answer simply states that "International has not entered into any agreement with The American Tobacco Company." (Record, v. I, p. 100, 107). *Every union contract in the record, covering the period from 1960 through 1974, states that promotions are based on seniority and qualifications. None of the contracts mention "lines of progression."* See Plaintiffs Exhibit 35FF and page 9 infra.

Plaintiffs' First Interrogatories to Defendant American Tobacco Company, interrogatory 5 (Record v. I, p. 47, 49), is: "State whether jobs in the plant are organized or grouped in any way into departments and/or lines of progression." The Company's answer, in relevant part, is: "There are a few jobs with qualifications other than seniority under the 'posting and bidding' system and these are listed in the attached 1968 agreement between Management and the three Eastern Locals (182, 183, and 192 of the TWIU)." (Record v. I, p. 285). Notwithstanding what the answer claims, the 1968 agreement does not mention lines of progression or the particular jobs involved, and neither does any of the other union contracts.

Since the answer describes the reduction in the number of lines of progression which occurred in 1968 but does not indicate the creation of any lines, the lines existed on and before January 1, 1960. The lines of progression were not created in 1968, as the majority assumes; they were eliminated in 1968, with the exception of the few at issue here. These few existed well before the effective date of the Act, and were not eliminated in 1968 when the rest were.

The Company provided two sets of answers to each interrogatory, one for the Richmond Branch and one for the Virginia Branch. The answer to interrogatory 6 quoted above is for the Richmond Branch. The answer for the Virginia Branch contains a paragraph identical to paragraph (b) quoted above, and also adds:

> By *1967*, the pattern of downward movement, principally of whites, had slowed somewhat, a few new hires were taken in, some whites elected voluntary layoff status rather than do some of the pipeline jobs, and *the Company and the Union negotiated the elimination of qualifications* except in those few jobs mentioned in answer to question 5.
> (Record, v. I, p. 287) (italics added).

The Answer to interrogatory 7 quoted above is for the Virginia Branch. The Richmond Branch answer reads: "7. Refer to Virginia Branch answers, same information is applicable. (Note only classifications of Adjusters and Learner Adjusters apply to Richmond Branch.)" (Record v. I, p. 270).[5] Lines of Progression were in existence prior

[5] The EEOC put similar interrogatories to the Company, and received similar answers. See EEOC Interrogatories 1-20 to Defendant American Brands, Inc., d/b/a The American Tobacco Company, interrogatories 8 and 16 (Record, v. I, p. 195, 201, 203-204) and the Company's answers (Record, v. I, p. 315, 318, 321-324 (Richmond Branch). and p. 327, 332, 336-338 (Virginia Branch)).

to 1960, and all but the nine[6] at issue here were eliminated by 1968.[7]

It is more than merely interesting to recognize that the named plaintiff, John Patterson, filed his charge not because he would not enter a line of progression as may be inferred from the various majority opinions filed in this case but because the line of progression that he was in was *eliminated* in 1968. Although a description of his line of progression, like the others, was not formally reduced to writing, Patterson and everyone else knew about it, relied on it, and Patterson was understandably upset when it was eliminated. Patterson had been a factory supply handler, and there had been a line of progression from that position to the position of machine operator. Supply handlers were trained to be operators, and part of their job as supply handler was to relieve the operator. In this manner handlers gained one or two hours of experience a day as operators. (Record, v. XVII, pp. 68-73, 105-106, 118; v. XXV, p. 56; v. XVIII, p. 57D; v. XIX, p. 4-5 (deposition of foreman Barnes); v. XXXVIII, p. 18 (deposition of employee Howard); v. XXXIV, pp. 43-44, 53-59-60 (deposition of Foreman Thomas); v. V, pp. 135-136 (Trial Transcript); v. VII, pp. 627-631 (Trial Transcript)). Patterson gave the following testimony at his deposition:

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[6] Since the district court found that three of the lines were justified by business necessity (see Finding # 31, EPD p. 6013), only six lines are actually at issue. However, because all nine lines pre-date the Act, they are all, if bona fide, protected by § 703(h), whether or not they are justified by business necessity.

[7] American's answers to plaintiffs' first set of interrogatories contain numerous other references to the existence of "qualifications" *prior to 1968* and to the elimination or reduction in the number of lines of progression in 1968. See, e.g., answers to interrogatories 20, 25, 26, 28, 29 (Record, v. I, pp. 294, 296, 298, 299, 300).

Q. Did you file a charge of discrimination with the EEOC?
A. Yes.
Q. I believe it was in 1968. Can you recall the specific charge that you made at that time?
A. Yes.
Q. What was that?
A. Well, the charge was that they had—you want me to go into detail on it?
Q. Be fine.
A. Well, I had put in my time for my hours of receiving a machine, which was supposed to be nine hundred hours, and in the meantime after we put in that nine hundred hours they gave out some machines, but they dipped back across from the agreement they made. They changed the agreement.
Q. Was this in 1968?
A. In '68.

* * *

Q. Do you recall the employees who got those promotions following the posting?
A. No, I don't recall that either.
Q. If I told you they were James Starkes, Isaiah Jones, Milton Branch and Andrew Yancey, would that refresh your memory?
A. Well, that seems like the four that were brought over after we had served our nine hundred hours. I say that seemed like the four.
Q. And they were all senior employees to you, were they not?
A. Yes, they were senior.
Q. And they were all black employees, were they not?
A. Yes.

* * *

Q. Now, as I understand it, the only claim of discrimination that you made so far as your testimony in response to Mr. Wickham's question is that you had accumulated 900 hours on the machine, is that correct?

A. Right.
Q. And that you didn't get a job as a machine operator, is that right?
A. Right.
Q. There was no other claim of discrimination that you are making?
A. Not for me.

* * *

Q. Who discriminated against you?
A. From what I understand, they changed the rule in the middle of the stream and I got hurt.

* * *

Q. How did they change the rule?
A. Well, from the way I look at it, they changed the rule when they reached over and got those four men and put them into jobs like that and left the other men that had accumulated the hours with the less seniority outside.
Q. Those four men were black men, weren't they?
A. Yes.
Q. This is what you mean when you say you were discriminated against?
A. Yes.
(Record, v. XXV, pp. 20-21, 23, 36, 27.)

Mr. Dillard (manager), in his trial testimony, confirmed that this was the basis of Patterson's charge. (Record, v. VIII, pp. 982-982, 1035.) The *elimination* of this line of progression in 1968 (from factory supply handler to machine operator) formed the basis of Patterson's charge. Patterson was in a line of progression, but when this line was eliminated and replaced with a posting and bidding system, others with more seniority got the vacancies.

Taylor, another named plaintiff, also filed a charge with the EEOC, alleging that his seniority rights were violated. His complaint is identical to Patterson's. He had acquired 900 hours' experience as an operator, but when that line

of progression was eliminated in 1968, four other blacks with more seniority got the position(s) he wanted. (Record v. XXV, pp. 72-82 (Taylor's deposition); v. XXXVIII, pp. 7-11, 18 (deposition of Howard, a black Union officer who has been with American since 1946): v. VIII, pp. 982-984, 1035 (Dillard's trial testimony)).

Every contract between American and the relevant locals of the Tobacco Workers' International Union clearly recognized that for some promotions, "qualifications" were necessary. Article 8 of the Union contract, for example, signed on November 4, 1959 (effective January 1, 1960) contains the following:

> All promotions and demotions shall be made in accordance with seniority *provided that,* in the opinion of the Management, *there is no question as to the qualifications* and efficiency of the employee concerned. (Italics added)

Identical or very similar clauses were included in every contract since then (no earlier contracts appear to be in the record). (See Record, v. XIV, Plaintiffs' Exhibit 35FF, Union Contracts effective January 1, 1962 (including amendment of Oct. 27, 1964); January 1, 1965; January 15, 1968; January 15, 1971.) These contracts, interpreted in light of the district court's finding on the meaning of "qualifications," show that at least since 1960, a promotion to certain jobs depended on whether or not the candidate "had filled a particular job before." This describes the essence of a job line of progression. Indeed, we so described it in the first panel opinion in nearly the same words. 535 F2d at 265. The 1968 and 1971 union contracts continued to use the terminology "qualifications." They did not use the phrase "lines of progression," nor did they identify which jobs are in lines of progression.

Plaintiffs' Exhibit #56 indicates which jobs, at the Virginia Branch, required "qualifications" in 1963 if not earlier. The exhibit lists 82 job classifications in which, as of September 1963, vacancies were filled by "the same system of filling vacancies (promotions) as the Richmond Branch, i. e., no qualifications, plantwide seniority only." That list of 82 jobs does not include any of the nine jobs at issue here (adjuster, learner adjuster, examiner-making, examiner-packing, ADT dryer operator, textile dryer operator, overhaul adjuster, adjuster-prefabrication, and turbine operator). The sentence immediately following that list reads:

> From September 16, 1963 to January 15, 1968 promotions to the remaining job classifications at Virginia Branch required plant-wide seniority and qualifications, with "qualifications" prevailing over seniority.

This clearly shows that at least as early as 1963, in order for an employee to get promoted to one of the nine jobs at issue here (as well as others), the employee had to have filled a particular job before. Lines of progression existed at least as early as September 16, 1963. See also Record, v. V, pp. 84-87.

The record is replete with evidence that as far back as the 1950's, for the jobs at issue here and for others, an employee had to work in the lower paying job before being promoted to the higher paying job. One of the nine lines that was recognized as an exception to the posting and bidding system is the line from catcher to examiner (Stipulations 38, 41). The deposition of S. Kirby, who started with American in 1952 as an Assistant Foreman, shows the following:

> Q. During that period of time [from 1952 to 1957], what type of qualifications did you have to have to

become an examiner?
A. You would have to be an experienced catcher.
(Record, v. XVI, p. 28-29; see also *Id.*, p. 52.)

The deposition of John Dillard, Manager (Record, v. XVII, p. 95), includes his statement that "To my knowledge, all of our examiners in the Making Department, at one time or another have been a catcher." Thus, the line of progression from catcher to examiner existed in the 1950's and was not "adopted" in 1968.

The progression from operator to learner adjuster was also excepted from the general posting and bidding system. (Stipulations 38 and 40, 8 EPD at p. 6010.) John Dillard started with American in 1940 as a factory clerk and worked his way up to become Manager in 1961(which position he still held in 1973, the date of his deposition). (Record, v. XVII, pp. 4-6.) Dillard's deposition contains the following:

Q. To your knowledge, have there *ever* been any learner adjusters who haven't been operators?
A. To my knowledge, all of our learner adjusters have come from the operating classification.
(Record, v. XVII, p. 94, emphasis added.)

E. B. Barnes started with American Tobacco in 1943 as a hopper filler and tote boy, and worked his way up to become foreman by the time his deposition was taken. (Record, v. XX, pp. 3-5.) The following exchange took place at Barnes' deposition:

Q. In order for a guy to be an adjuster, would it be an advantage for him to be a maker or packer operator?
A. Oh, definitely, yes, definitely. It is almost a must. You put somebody on there to make an adjuster out of him, it would be like trying to take me and

make me an engineer without giving me an education.

Q. Do you know of any situations since you have been there where a making adjuster is put to work without being an operator first?

A. I don't recall any. I don't know of any. I don't know of any.

Q. Is there any rule that says you have to be one?

A. I think this is one of the things that goes on the posting notice when they post, to say the qualifications are that you are an operator. If it was making adjuster, that you were a making operator, etc.

(Record, v. XX, pp. 84-85.)

While the Virginia Branch had nine lines of progression, the Richmond Branch had lines leading to only two positions, learner adjuster and adjuster. (Stipulation 38, *supra.*) W. F. Miller, assistant manager of the Richmond Branch, testified at trial as follows:

Q. Now, under that departmental seniority, were there any other qualifications [f]or promotions during that period, other than seniority, departmental?

A. This was still prior to—

Q. Prior to 1963?

A. No, sir. The only qualifications were people that were interested and could learn the job. Other than we had one of our qualifications on the line of the progress.

Q. The line of progression?

A. The line of progression; that you had to be a packing machine operator before you became a learner adjuster.

Q. And a learner adjuster before you became an adjuster?

A. Yes.

Q. That line of progression is still in effect?

A. Yes, it is.

Q. And it has been even since prior to the merger?
A. Yes, sir.
(Record, v. VII, Trial Transcript, pp. 868-869. The merger referred to is obviously the merger of the two union locals which took place on September 16, 1963.)

H. Nuckols, Jr. was Machine Shop Foreman from 1955 to 1969. He also testified at trial:

Q. And what are the qualifications for becoming a learner adjuster?
A. The basic qualification is that he have been a operator, machine operator, a packer, or making machine operator.
Q. Why is this necessary?
A. Well, I would think it would be necessary in order that he would become somewhat familiar with the machine. *That is just one of the regulations they have had down through the times that they have always used.* . . .
Q. Now, sir, in order to become an adjuster, is it correct to say that you must serve as a learner adjuster first?
A. Yes.
(Record, v. V, Trial Transcript, pp. 241-242; italics added.)

Nuckols further testified that to his knowledge, every adjuster and learner adjuster has served as either a packing or making machine operator (*Id.* at 244) and that this requirement was a prerequisite (*Id.* at 267).

G. A. Howard started with American in 1946 as a general laborer, and was a learner adjuster when his deposition was taken. He confirmed that prior to 1968 the "qualification[. . .]" for learner adjuster was to have been an operator. (Record, v. XXXVIII, p. 19.) Foreman O'Brien, in his deposition, also confirmed that prior to 1968 adjusters

were first operators. (Record, v. XIX, p. 38.)

Indeed, at least as early as 1963, the required qualification for "progressing" from operator to learner adjuster to adjuster existed and was used to fill even temporary vacancies. Referring to the period from 1963 to 1968, Dillard gave the following testimony at trial:

> Q. What about your adjusters? Were they handled in the same way as your machine operators?
> A. The adjusters *followed a progression that led to the job*. They had previously been an operator—
> Q. I am only talking about temporary vacancies now.
> A. Yes. I am telling you about temporary vacancies. They had been an operator, and then they had been a learner adjuster, and then they had been an adjuster.
> Q. And you filled the temporary vacancy in one of those jobs by getting someone who had previously done the job?
> A. We had a list of people, and the list was set up by seniority and qualifications, and we used the list.
> (Record, v. V, Trial Transcript, pp. 122-123.)

The EEOC, in its Post-Trial Brief, states that "qualifications" were used in the canvassing method of filling temporary vacancies "From 1963 to 1968." EEOC's Post-Trial Brief at 35 (Aug. 7, 1974). It is clear from the uncontradicted testimony at trial and in depositions introduced into evidence that the line of progression from operator to learner adjuster existed for many years prior to 1968, and prior to the effective date of Title VII.

The same is true of the progression from learner adjuster to adjuster. This line was also recognized as an exception to the posting and bidding procedure. (Stipulations 38, 39, 8 EPD at p. 6010.) Dillard's deposition includes the following:

Q. Have there *ever* been any adjusters who haven't been learner adjusters?

A. I don't positively know the answer to that question. In recent years I know that—and when I say recent years, I mean *in the last twenty-five years or so—all of the adjusters have come from the learner adjuster grouping.*

. . . .

(Record, v. XVII, p. 94, emphasis added.)

Employee Kirby's deposition includes:

Q. During that period of time from '57 to '62, again, how did someone become an adjuster?

A. Someone would have become a learner adjuster before he would have become an adjuster.

(Record, v. XVI, p. 42.)

Miller's trial testimony, quoted *supra*, confirms that prior to 1963 one had to be a learner adjuster before becoming an adjuster. Nuckols' trial testimony, also quoted *supra*, provides further confirmation that the line of progression from learner adjuster to adjuster existed well prior to the effective date of Title VII.

Indeed, the plaintiffs argued that the "qualification" of being a learner adjuster before becoming an adjuster has "always" existed. The Plaintiffs' Memorandum in Opposition to Defendants' Motion to Amend and Supplement Findings of Fact and Conclusions of Law (Record, v. IV, p. 211) includes the following response to the defendants' proposed Supplemental Finding #5:[8]

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[8] American Tobacco's Motion to Amend and Supplemental Findings of Fact and Conclusions of Law and to Proffer Additional Evidence (Record, v. IV, p. 130) includes Proposed Supplemental Finding of Fact #5;

5. Both the Richmond and Virginia Branches established plant-wide seniority in 1963. The Richmond Branch has never used prior experience on a job as a prerequisite to a promotion to any job under the jurisdiction of TWIU Local 182. The Vir-

> 5. Supplemental Finding #5 is adequately covered in the Court's Finding #8. The Company's suggested supplement is incorrect, e.g. *the Richmond Branch has always required its TWIU "adjusters" to hold the position of "learner adjuster."* In addition the Virginia Branch maintained "lines of progression" as recently as the date of trial. (Stipulations Nos. 39-47.) (*Id.*, emphasis added.)

Here, then, even the plaintiffs allege that the learner adjuster-adjuster line of progression "has always" existed at the Richmond Branch.[9]

The posting and bidding system instituted in 1968 also recognized an exception for the progression from line searcher to examiner-packing. (Stipulations 38 and 42, 8 EPD, p. 6010.) The Dillard deposition includes:

> Q. All right, sir. It is my understanding, also, that in order to become an examiner in Packing, you should have been a line searcher, is that correct?
> A. Yes, sir, that is correct.
> * * *
> Q. Have there ever been any examiners who haven't been line —
> A. I am not really sure of this one. I know that we have not had any examiners that haven't been line [searchers] at some time in recent years.

(Record, v. XVII, p. 96; by "recent years" he means within the last 25 years, *Id*, p. 94.)

The Dillard deposition also indicates that the boiler operator to turbine operator line of progression has existed

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ginia Branch used "qualifications" (prior experience) in certain classifications until January 15, 1968.
(Stipulation #38 directly contradicts the second sentence of the proposed finding.)

[9] The Court denied defendants' motion to amend and supplement. Record, v. IV, p. 267.

for at least fifteen or twenty years. (Record, v. XVII, pp. 100-101; see Stipulations 38 and 47, 8 EPD, p. 6010.)

Finally, even the EEOC claims that "qualifications" were used, not *after* 1968, but "until 1968." Plaintiff-Equal Employment Opportunity Commission's Post-Trial Brief at 33. Plaintiffs, John Patterson, et al, agree. In their separate post-trial brief, they claim that qualifications were part of "The American Tobacco Company's Promotional Systems Which Were In Effect *Prior to January 15, 1968.*" Post Trial Brief of Plaintiffs John Patterson, et al, at 62 (emphasis added). Indeed, that brief at that page indicates the system of "qualifications" was instituted "[f]ollowing the merger . . . on September 16, 1963. . . ," as does the EEOC brief quoted last above. The only reasonable meaning to "following" is just following.

IV

It is acknowledged that the majority holding as to the effect of § 703(h) on the lines of progression within the seniority system is based entirely on the fact that the lines did not exist in 1965. I maintain this fact is simply not in the record.

Because the question of exactly when the lines of progression were initiated is so important in this case and was never made such an issue of in the district court or in the previous hearings in this court, I am of opinion the remand order should include a direction to inquire into the lines of progression to ascertain when and under what circumstances they came into being.

I doubt that it is fair to the plaintiffs to decide the question on the record before us now, but should we so do, the record is uncontradicted that the lines of progression came into being at the very latest just following the merger

of the two unions in 1963, almost two years before the effective date of the statute.

Should such an inquiry disclose that which the record tends to show, that the lines of progression were instituted prior to the effective date of the statute, then the district court should further inquire as to their bona fides.

V

Footnote 4 of the majority opinion, in refutation of the facts disclosed by this dissent, I find, with all respect, equally as unsupported by the record as is the body of the opinion.

There follows an analysis of the footnote, albeit somewhat out of the same order in which the footnote is written:

A.

The footnote ends with the conclusion that, "within contemplation of § 703(h), the job line of progression policy here in question only came into existence in 1968," and, as a part of its authority for that conclusion, states that "a panel of this court has long since assumed" that fact. A principal problem with this case for some time has been the assumption of facts rather than their finding from the record. See, for example, my previous dissent at 586 F2d 305, 306 concerning the promotion of supervisory employees, which required a similar factual analysis. The majority here, I suggest, assumes the same fact it says the panel assumed. Assumption of facts, especially critical contentious facts, is not an acceptable way to reach a decision, I think. Rather, resort to the record is required.

While I acknowledge an "exhaustive search of the evidentiary record," I must confess to disappointment because there was no "exhaustive counter-analysis of the factual record." I suggest that a counter-analysis would not have

supported the critical fact on which the majority bases its opinion.

B.

The position the majority takes in its footnote 4 is in reality twofold.

First, to support its conclusion that the lines of progression were only adopted in January 1968, it concedes that there were "informal rudiments" of such before 1965. Such informal rudiments, however, according to the majority, were replaced in 1968 by "stated procedures adopted by American in 1968 to control entry into and promotions within specifically identified job 'lines' ".

This conclusion of the majority, I think, is not only unsupported by the record, it is entirely refuted by the record.

Both the January 1965 and the 1968 collective bargaining agreements in their only references to lines of progression state *in haec verba*:

> "All promotions and demotions shall be made in accordance with seniority except as otherwise agreed to by the Company and the appropriate Union local or locals, provided these promotions and demotions shall be made without regard to race, color, creed, sex, or national origin, and provided that, in the opinion of Management, there is no question as to the qualifications and efficiency of the employee concerned."

We must remember that "lines of progression" was not a part of the parlance of the employee, the employer, or the union until this claim became contentious. The parties all referred to job qualifications, as does the collective bargaining agreement. So, the "stated procedures" relied upon by the majority as coming into existence in 1968 in fact were in existence at least as early as January 1965. And not only were they in existence, they were letter for letter the same.

The above quotation from footnote 4 next provides that the job lines involved were "specifically identified." The use of "specifically identified" as used by the majority may easily have two meanings. One of the meanings is that the job lines were "specifically identified" in 1968 but had not been before. The other is that while the job lines had been "specifically identified" before, they were governed only by "stated procedures" beginning in 1968. Neither meaning is supported by the record. Neither the collective bargaining agreement of 1965 nor the collective bargaining agreement of 1968 has any job line which is "specifically identified." As I have heretofore pointed out, the number of job lines of progression was reduced in 1968. But, other than a reduction in numbers, the job lines of progression remained the same. The identity of the job lines of progression involved was known to everyone both before and after the 1968 agreement, as were the qualifications to benefit by one of those lines.

Footnote 4 goes on to say that within the specifically identified job lines of progression, "enough of change and formalization" took place in 1968 "to constitute a new policy, or at least one so radically altered from prior unstructured procedures" that it could not be considered a routine continuation of the old policy. I take issue with this fact finding also, and note it was not made by the district court but by this court.

That there was no "change" in the lines of progression policy by the collective bargaining agreements is clearly shown by the language of those agreements I have quoted above. The majority opinion then suggests that there was not only "change" but also "formalization" which had not existed before. By "formalization" the majority opinion may only suggest that that which theretofore had been informal

was made formal in 1968. The short answer is that the policy was formal both in 1965 and in 1968, as is again shown by the collective bargaining agreements. What could be more formal than a written contract between the company and the union? I suggest that nothing could. And I note that the majority does not demonstrate by jot or tittle how anything became formal in 1968 which theretofore had been informal. While it finds that there was a "new policy" commencing in 1968, it fails to tell us what the old policy was. Indeed, this would also seem to be impossible in view of the letter for letter repetition of the 1965 provision in the 1968 contract. The remarks just above also apply to the majority's finding that if the policy was not new, it was "at least one so radically altered" that it could not be considered simply a routine continuation of old policy. What the policy was before alteration is also not explained in the majority opinion, and, for the same reasons I have outlined above, I suggest it is impossible to explain because there was no difference.

The majority relies on *Teamsters*, 431 U.S. at 352, for its legal conclusion that the policy it finds as either *"new"* or "so radically altered" is not "simply a 'routine application' " of "those pre1965 procedures." It emphasizes that it construes § 703(h) as a "quite narrow exception" to Title VII's general coverage of conditions of employment, and again emphasizes that it considers the "routine application" of pre-1965 policies should be "given a stringent reading against any employer seeking the special insulation provided by § 703(h) for any seniority 'system' alleged to have been in place when Title VII was enacted." "On that basis," in the majority's words, it carries its "stringent reading against any employer seeking special insulation provided by § 703(h)" into fact finding, for the concluding sentence of

the fact finding, "on that basis," is that the lines of progression only came into existence in 1968. I do not think that *Teamsters*, or any construction of it, authorizes a "stringent reading" against anyone, employer, employee, or union, with respect to fact finding. I had thought courts must be neutral fact finders.

If it be said that the "stringent reading against any employer" is meant only to refer to whether or not § 703(h) should apply, the majority has carried that "stringent reading" into full force and effect by the result it obtains on account of changes in the lines of progression. The only way the majority can find liability on this record without further fact finding by the district court is by giving such a "stringent reading" against the employer and the union that it actually finds liability when all the employer and the union tried to do was to improve the existing conditions for the plaintiff class, as I will set out below, for it must be remembered that *each relevant change in the collective bargaining agreements disclosed in this record, whether pre- or post-act, has benefited the plaintiff class. None have been to its detriment.*

C.

While the above comments go largely to the majority's lack of factual support by analysis or by supporting testimony or exhibits to support its conclusion, and incidentally to its construction of *Teamsters*, perhaps the most serious error it makes in its efforts to support the key conclusion as to the 1968 establishment of lines of progression is this: It holds that if there is enough change and formalization of the lines of progression policy, "whether *in favor of* or against employee interest," to constitute a new or radically altered policy, then the new policy is not entitled to a § 703(h)

exemption. (Italics added.) "Employee interest" may only be considered the interest of the plaintiffs since that is what this case is all about, and there is no litigation at hand concerning the interest of other employees. Thus, the majority boldly holds that a change in a previously existing seniority system, although the change may be in favor of a class of black employees, will deprive the company and the union making the change from the benefit of a § 703(h) exemption.

Nothing I can think of could be less founded either in law or logic.

In the 1968 contract, for example, there is a provision for posting job openings either superimposed upon the system of lines of progression, or from which nine lines of progression were excepted. (1968 contract p. 4; stipulation 38.) Of course this action, especially when coupled with the elimination of certain lines of progression as took place, would only have had a favorable effect on the black employees as a class, for the cases are too numerous to bear citation, which, in their remedies for racially discriminatory employment practices, provide for posting and bidding. Thus, logic rejects this aspect of the conclusion of the majority.

The law likewise rejects this conclusion in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), in which the holding of the court was that it was not a violation of the 1964 Civil Rights Act for an employer and a union to agree to a preference for minority employees. The court said that the act is "intended as a spur or catalyst to cause employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." 443 U.S. at 204. Thus,

Weber approved actions by employers and unions designed to alleviate previously existing discriminatory conditions of employment. That part of the majority opinion providing that a company and a union cannot alter a seniority system so as to make more favorable the conditions of employment of minority employees is directly contrary to *Weber*, I think. It requires a too strained construction of the statute to hold that a seniority system admittedly discriminatory in effect, as in *Teamsters*, is protected by § 703(h) so long as it remains unchanged, but if it is changed in favor of the minority employees, then the employer and the union lose their § 703(h) exemption.

Not only is this conclusion contrary to logic and law, it is a blow against minority employees and contrary to the purpose of the statute. Hereafter, in this circuit at least, neither an employer nor a union may safely agree to any change in a seniority system existing before July 1, 1965 for fear that its § 703(h) exemption will be lost. Thus, a seniority system as rigid as the one approved in *Teamsters*, which protects a group of white employees, under the provisions of § 703(h), will receive the sanction of the statute and the blessings of this court, while a seniority system equally as rigid but which by the action of the employer and the union has, since July 1, 1965, ameliorated a part of the previously existing discriminatory conditions, will not. Such a conclusion, I suggest may sound astonishing, yet that is precisely what the majority holds.

I am authorized to state that Judge Russell concurs in this opinion.

No. 80-1199

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY, *et al.*,

Petitioners,

v.

JOHN PATTERSON, *et al.*

AMERICAN BRANDS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an employer and a union may be immune from Title VII liability for establishing and maintaining discriminatory lines of progression which are not justified by business necessity, where

(a) the lines of progression were instituted after the effective date of Title VII,[1] and

(b) the lines of progression are not a component of a "seniority system" within the meaning of §703(h).[2]

1/ Contrary to petitioners' statement (Pet. at i), this case presents no question concerning a seniority system "revised" after the effective date of Title VII. Petitioners have conceded that, for the purposes of the petition, the lines of progression "[came] into existence after Title VII's effective date." Pet. at 5 n.5.

2/ This alternative basis for the decision below was relied upon by the panel majority but was not reached by the Fourth Circuit en banc. See Argument II infra.

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No. 80-1199

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THE AMERICAN TOBACCO COMPANY, et al.,

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v.

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AMERICAN BRANDS, INC.,

Petitioner,

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Charges of race and sex discrimination were filed against American[3/] and the Tobacco Workers'

3/ "American," as used herein, refers collectively to the American Tobacco Company, a Division of American Brands, Inc., and to American Brands, Inc.

Union[4] in 1969. In the ensuing twelve years, the consolidated employment discrimination cases now before the Court have generated three published opinions of the district court,[5] two panel decisions in the Fourth Circuit,[6] and the recent opinions of the Fourth Circuit en banc.[7] But the plaintiffs and class members -- approximately 500 black and female employees and former employees, many of whom have reached retirement age during this protracted litigation[8] --

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4/ "Tobacco Workers' Union" and "Union," as used herein, refer collectively to the Tobacco Workers' International Union and Local 182, Tobacco Workers' International Union.

5/ 8 FEP Cases 778 (E.D. Va. 1974); 11 FEP Cases 577 (1974); 18 FEP Cases 371 (1977).

6/ 535 F.2d 257 (1976); 586 F.2d 300 (1978).

7/ 634 F.2d 744 (1980), reprinted in Pet. App. 1-50.

8/ The individual named plaintiffs began working at American as early as 1941. 8 FEP Cases at 786. "[T]he static condition of the tobacco industry generally, and American in particular, and the advent of automation, both ... have limited opportunities for upward movement of present employees and for new hiring." Id. at 782. As the Fourth Circuit noted, 535 F.2d at 267,

have yet to obtain any monetary relief. 9/ "[T]his litigation has proceeded at a regrettably slow pace to date[, and t]he ultimate relief to those of the plaintiffs [and class members] entitled to back wages has long been denied." Pet. App. 25 (Winter, J., concurring and dissenting). All procedings to determine

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6/ continued

> [t]he [district] court's description of the lack of employment opportunities is well supported by the evidence. No new employees were hired to fill jobs under [the] jurisdiction of the union from September 12, 1955, through June 12, 1964, in the Richmond branch, and May 12, 1966, in the Virginia branch. Employment in both branches decreased from 1953 to 1973 by approximately 1300 workers.

9/ Monetary relief, including not only back pay but also pension and profit-sharing benefits, is the only effective form of relief for the elderly victims of petitioners' discrimination, and for the families of class members who have died while these cases have been pending before the courts. The district court, recognizing the importance of such relief to the plaintiffs and class members here, specifically provided for payment of wrongfully denied profit-sharing and retirement benefits. 8 FEP Cases at 783; 18 FEP Cases at 376.

and award back pay, pension benefits, and other monetary relief have been stayed pending disposition of the latest petition for certiorari,[10/] by which petitioners have brought these cases before this Court for the second time.[11/]

10/ On January 7, 1977, the district court entered an order on remand referring the cases to a special master for proceedings to identify eligible class members and to calculate the amount of back pay and other benefits to be awarded. 18 FEP Cases at 375. These proceedings have never taken place. American and the Union appealed from the district court's denial of their motion to vacate this order and, following the Fourth Circuit's en banc decision remanding once again to the district court, obtained an order from the Fourth Circuit staying its mandate pending application for a writ of certiorari. See Order in No. 78-1083, filed Dec. 11, 1980, extended Jan. 9, 1981. Pursuant to Rule 41(b), Fed. R. App. P., this stay "shall continue until final disposition [of the petition for certiorari] by the Supreme Court."

11/ See American Tobacco Co. v. Patterson, 429 U.S. 920, denying cert. to 535 F.2d 257 (4th Cir. 1976). There the Court denied American's and the Union's petitions for certiorari which presented, inter alia, the following question: "Where a seniority system has operated to permit all employees to compete equally for promotions for a period well in excess of the statutory period during which a charge must be filed, is it permissible to find a violation of Title VII based

The pertinent findings of the district court, which were affirmed by the court of appeals in a decision which this Court declined to review, establish the following facts. See 8 FEP Cases 778 (E.D. Va. 1974), aff'd in pertinent part, 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976). American operates two plants in Richmond, Virgina: the "Virginia branch" manufactures cigarettes, and the "Richmond branch" manufactures pipe tobacco. The two branches are located only a few blocks apart, are covered by a single collective bargaining agreement, are served by one administrative office,[12/] and hire employees from the same labor market. Each branch is divided into two production departments: the prefabrication department blends and prepares tobacco for further processing, and the fabrica-

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11/ continued

on statistics showing continuing disproportionate numbers of blacks and females in some job classifications and white males in others?" Petition for Certiorari, No. 76-46, at 2-3 (1976).

12/ The plaintiffs also challenged discriminatory employment practices in this office, known as the "Richmond office." The pending petition for certiorari does not seek review with respect to those practices.

tion department manufactures the finished products. Employees in prefabrication generally are paid lower wages than those in fabrication, and employees at the Richmond branch generally are paid lower wages than those at the Virginia branch.

Until 1963, American and the Tobacco Workers' Union maintained an overt policy of job and departmental segregation on the basis of race and sex.[13/] Blacks were generally assigned to lower-paying jobs in the prefabrication departments of both branches, while jobs in fabrication were largely reserved for whites.[14/] Promotions were made on the basis of departmental seniority, and employees could not transfer from one department to another without forfeiting seniority.

13/ "Before 1963 the union and the company overtly segregated employees by race with respect to job assignments, cafeterias, restrooms, lockers, and plant entrances. White employees were represented by Local 182 of the Tobacco Workers' International Union, while black employees were represented by Local 216." 535 F.2d at 263.

14/ The branches were also racially indentifiable. As of 1962, blacks held 41 percent of all factory jobs (93 of 227 jobs) at the lower-paying Richmond branch, but only 14 percent of all factory jobs (201 of 1,476 jobs) at the higher-paying Virginia Branch. 8 FEP Cases at 792.

The segregated locals were merged and overt job and departmental segregation came to an end in 1963, but purposeful discrimination continued. Blacks were denied access to higher-paying jobs at the Virginia branch on the basis of unwritten, subjective selection procedures administered by white supervisors. At the Richmond branch, there were no written job descriptions, and supervisors canvassed employees to fill vacancies. 535 F.2d at 263. As late as 1973, the prefabrication department at the Virginia branch remained more than 80 percent black, while the fabrication department was still 86 percent white; the prefabrication department at the Richmond branch was 92 percent black, while the fabrication department was approximately 62 percent white. Id. at 264.[15/]

In 1968, American and the Union instituted a job posting and bidding procedure, under which the bidder with the most seniority within the branch containing a vacancy was awarded the job. At the

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15/ As of 1973, 58 percent of the employees (90 of 156 employees) at the Richmond branch were black, while only 17 percent of the employees at the Virginia branch (149 of 864 employees) were black. 8 FEP Cases at 792.

same time, however, they established an exception to the posting-and-bidding procedure for nine traditionally segregated job classifications.[16/] When a vacancy occurs in one of these job classifications, only employees who have held a specified lower-level job in one of nine "lines of progression"[17/] are eligible to bid on the vacancy. The requirement of experience in a job within a line of progression operates as a prerequisite for the application of the seniority system; among the limited number of employees who satisfy this prerequisite and are therefore

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16/ The following jobs were exempted at the Virginia branch: adjuster, learner adjuster, examiner-making, examiner-packing, adt dryer operator, textile dryer operator, overhaul adjuster, adjuster-prefabrication, and turbine operator. The jobs of adjuster and learner-adjuster were also exempted at the Richmond branch. 8 FEP Cases at 786. The jobs of adt dryer operator and textile dryer operator are traditionally black jobs; the remaining exempt jobs are traditionally white. See Brief for John Patterson, et al., Nos. 75-1259-1261, Appendix A (4th Cir. 1975).

17/ Each line of progression contains only two or three jobs. See 8 FEP Cases at 786. Two lines of progression -- for adjuster and learner-adjuster -- apply to both branches. Id.

eligible to bid on the vacancy, branch seniority is applied to determine the successful bidder. 8 FEP Cases at 786.

The district court found that, in six of the nine lines of progression, the experience requirement was discriminatory and was not justified by business necessity. 8 FEP Cases at 790. The Fourth Circuit expressly affirmed this finding, 535 F.2d at 264-65,[18/] as well as the district court's findings that "rigid segregation" of job classifications characterized both branches as late as 1973, id. at 264, and that the seniority system perpetuated past intentional segregation and was not justified by business necessity, id. at 265.[19/]

18/ As the Fourth Circuit noted, most of the jobs in these lines of progression were in the fabrication departments. "Since black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority." Id. at 264.

19/ The Fourth Circuit also affirmed the district court's findings of race and sex discrimination in the selection of supervisors. 535 F.2d at 272. This issue, which has not been presented to the Court in the pending petition for certiorari, was subsequently remanded to the district court by the Fourth Circuit en banc.

Petitioners subsequently filed a motion under Rule 60(b), Fed. R. Civ. P., asking the district court to vacate its orders and dismiss the complaints on the basis of this Court's decision in, inter alia, International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).[20/] On appeal from the district court's denial of this motion, a majority of the Fourth Circuit panel held, in pertinent part, that §703(h) of Title VII did not provide American and the Union any protection from liability for the discriminatory effects of their lines of progression because those lines were not part of a "seniority system." 586 F.2d at 303. On rehearing en banc, the majority did not reach this question but affirmed on the ground that, even if the lines of progression were considered part of a seniority system, §703(h) has

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20/ The motion also sought dismissal of the complaints on the basis of the decisions in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), and Hazelwood School District v. United States, 433 U.S. 299 (1977). The Fourth Circuit en banc affirmed the district court's denial of the motion on the Evans issue and remanded the Hazelwood issue for further consideration. Pet. App. 12-19. Neither of these issues is presented by the pending petition for certiorari.

no application to systems established after the effective date of Title VII. Pet. App. 8-9 and n.3. Petitioners have sought review of the en banc court's decision only with respect to this one issue.[21/]

SUMMARY OF ARGUMENT

In Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Court conducted an exhaustive analysis of the legislative purpose and history of §703(h) of Title VII. The Fourth Circuit en banc correctly applied this analysis in concluding that the immunity accorded seniority systems by §703(h) does not apply to systems instituted after the effective date of Title VII. The result reached by the Fourth Circuit en banc is also supported by

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21/ In addition to affirming the district court on the Evans issue and remanding for further proceedings in light of Hazelwood, the en banc court also remanded for further findings, in light of Teamsters, regarding the seniority system's application to inter-branch transfers. Pet. App. 11-12. The pending petition for certiorari presents none of these issues for review.

the panel majority's conclusion that the lines of progression at issue here do not constitute a "seniority system" within the meaning of §703(h). This conclusion accords with the Court's recent decision in California Brewers Association v. Bryant, 444 U.S. 598 (1980).

In any event, the Fourth Circuit has remanded these cases to the district court for determination of a series of potentially complex factual and legal issues which are not presented for review in the pending petition for certiorari. The circumstances here do not justify a departure from the Court's normal practice of denying interlocutory review. Indeed, the advanced age of many plaintiffs and class members, and their failure to obtain any monetary relief throughout the long history of this protracted litigation, demonstrate why this practice should be followed. The petition for a writ of certiorari therefore should be denied.

ARGUMENT

Reasons for Denying the Writ

I.

THE FOURTH CIRCUIT EN BANC CORRECTLY APPLIED PRIOR DECISIONS OF THIS COURT IN HOLDING THAT DISCRIMINATORY SENIORITY SYSTEMS ADOPTED AFTER THE EFFECTIVE DATE OF TITLE VII ARE NOT EXEMPT FROM THE ACT.

Petitioners' argument that a substantial federal question arises with respect to the reach of §703(h) runs squarely into this Court's prior decisions in International Brotherhood of Teamsters v. United States, supra, 431 U.S. at 350-55, and Franks v. Bowman Transportation Co., supra, 424 U.S. at 757-62, which plainly found the scope and history of the provision's immunity for seniority systems to be limited to systems in existence at the time Title VII was enacted. Indeed, petitioners reargue issues of statutory construction specifically resolved by this Court in the 1975 Term. Certiorari, therefore, should be denied.

The court below found that the legislative history of §703(h) was "exhaustively analyzed" in Teamsters and Franks. Pet. App. 9-10. The Fourth Circuit then held that this Court's analysis

"conclusively demonstrates that Congress intended the immunity accorded seniority systems by §703(h) to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act applications of such systems." Id. In Franks, the Court concluded that "the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." 424 U.S. at 761. Mr. Justice Powell, joined by Mr. Justice Rehnquist, agreed with the majority that "the 'thrust' of that section is the validation of seniority plans in existence on the effective date of Title VII." 424 U.S. at 791 (concurring in part and dissenting in part); see id. at 780 (Burger, C.J., agreeing generally with Mr. Justice Powell).[22/] In Teamsters, the Court again concluded that "the congressional judgment was that Title VII should not outlaw the use of

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22/ In Franks, the Court reversed a lower court ruling that §703(h) barred an award of retroactive seniority relief.

existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." 431 U.S. at 353.[23/]

In both Franks and Teamsters, the Court exhaustively reviewed available indicia of congressional intent, and determined that the purpose of §703(h) was to protect incumbent workers who had vested seniority rights when Title VII went into effect. The Court found that Title VII's effect on seniority systems was prospective and not retrospective:

> The initial bill reported by the House Judiciary Committee as HR 7152 and passed by the full House on February 10, 1964, did not contain §703(h). Neither the House bill nor the majority Judiciary Committee Report even mentioned the problem of seniority. That subject thereafter surfaced during the debate of the bill in the Senate. This debate prompted Senators Clark and Case to respond to criticism that Title VII would destroy existing seniority systems by placing an interpretive memorandum in the Congres-

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23/ Mr. Justice Marshall, joined by Mr. Justice Brennan, would have construed §703(h) as not protecting seniority sytems that perpetuate even pre-Act discrimination. 431 U.S. at 384-85 (concurring in part and dissenting in part).

> sional Record. The memorandum stated: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." 110 Cong. Rec. 7213 (1964). Senator Clark also placed in the Congressional Record a Justice Department statement concerning Title VII which stated: "[I]t has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect." Id., at 7207.

Franks, 424 U.S. at 759-60 (emphasis added) (footnotes omitted).

In Teamsters, the Court again reviewed the debate concerning the effect of H.R. 7152 on "existing seniority rights," as well as the Clark-Case interpretive memorandum and the Justice Department statement that "'Title VII would have no effect on seniority rights existing at the time it takes effect.'" 431 U.S. at 350-51. The Court continued:

> While these statements were made before §703(h) was added to Title VII, they are authoritative indicators of that section's purpose. Section 703(h) was enacted as part of the Mansfield-Dirksen compromise substitute bill that cleared the way for the passage of Title VII. The drafters of the compromise bill stated that one of its principal goals was to resolve the ambiguities in the House-passed version of HR 7152. See, e.g., 110 Cong. Rec. 11935-11937

> (1964) (remarks of Sen. Dirksen); id., at 12707 (remarks of Sen. Humphrey). As the debates indicate, one of those ambiguities concerned Title VII's impact on existing collectively bargained seniority rights. It is apparent that §703(h) was drafted with an eye toward meeting the earlier criticism on this issue with an explicit provision embodying the understanding and assurances of the Act's proponents: namely, that Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act."

Teamsters, 431 U.S. at 352 (emphasis added)(footnotes omitted).

Petitioners concede that "[t]his Court is no stranger to the circumstances preceding the adoption of §703(h)." Pet. at 13. However, petitioners seek to avoid the force of Franks and Teamsters by invoking the "plain meaning" rule and questioning the probative value of the legislative history relied on by this Court. Pet. at 10-15. Neither approach is correct or presents a substantial question requiring review.

"[A]s with the other provisions of §703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not." Franks, 424 U.S. at 758. In §703, Congress "proscribe[d] not only overt discrimina-

tion but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Were it not for §703(h), all seniority systems which have a discriminatory impact and are not justified by business necessity would be prohibited. See Teamsters, 431 U.S. at 349. By its terms, however, seniority systems are not unlawful if "bona fide" and if any differences in treatment are not "the result of an intention to discriminate." Id. at 353. This provision, like the parallel exception to the Age Discrimination in Employment Act of 1967,[24/] plainly protects "the countless bona fide ... plans existing ... when the Act was passed." United Air Lines, Inc. v. McMann, 434 U.S. 192, 199 (1977).

The "literal terms of §703(h)," Teamsters, 431 U.S. at 350, are consistent with the statutory purpose and legislative history explicated by the Court in Franks and Teamsters. It is too late in the day for petitioners to argue that a different

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24/ Section 4(f)(2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §623(f)(2), provides that it shall not be unlawful "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this [Act]..."

purported "plain meaning" of the statute should control in the face of countervailing clearly expressed legislative purpose and history.[25/] This is particularly true with respect to labor practices legislation. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).[26/] Indeed, the Court has consistently construed the §703(h) exceptions to Title VII's prohibition of employ-

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25/ "'When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."'" Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976), quoting United States v. American Trucking Ass'ns, 310 U.S. 531, 543-44 (1940). See generally Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975).

26/ See 313 U.S. 185-86:

> Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize.

ment discrimination to effectuate the broad purposes of the Act and the command of specific legislative history. See Griggs v. Duke Power Co., supra, 401 U.S. at 433-36; Franks, supra; Teamsters, supra.

Petitioners attack the Clark-Case and Justice Department statements specifically cited and relied upon by the Court in Franks and Teamsters. Pet. at 13-15. However, the weight to be given these statements was an issue specifically briefed by the parties and decided by the Court in Franks.[27/] The Court in Teamsters characterized these statements as "authoritative indicators" of the purpose of §703(h). 431 U.S. at 352.[28/]

27/ See, e.g., Brief for Petitioners, No. 74-728, at 25-31 (1975); Brief for Respondent Bowman Transportation Co., No. 74-728, at 7-13 (1975); Brief for Respondent United Steelworkers of America and for the AFL-CIO as Amici Curiae, No. 74-728, at 10-22 (1975); Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, No. 74-728, at 18 (1975).

23/ The Court observed that:

> Senators Clark and Case were the "bipartisan captains" responsible for Title VII during the Senate debate. Bipartisan captains were

The Fourth Circuit, therefore, correctly applied Teamsters and Franks, and no need arises to reconsider their analysis of §703(h).[29] Congress intended to enact a comprehensive pro-

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28/ continued

> selected for each title of the Civil Rights Act by the leading proponents of the Act in both parties. They were responsible for explaining their title in detail, defending it, and leading discussion on it.

Teamsters, supra, 431 U.S. at 351 n.35 (citations ommited). See Griggs, supra, 401 U.S. at 434.

29/ Contrary to petitioners' suggestion, Pet. at 16-17, the Court has not disavowed its analysis of the purpose and history of §703(h). In Teamsters, in the context of a discussion of how the government had proved a post-Act pattern of discriminatory hiring, assignment, transfer, and promotion polices, the Court stated that the section "does not distinguish between perpetuation of pre- and post- Act discrimination," and that holding the seniority system unlawful for perpetuation of post-Act discrimination "would in no way enlarge the relief to be awarded." 431 U.S. at 348 & n.30. Subsequently, the Court clarified the scope of §703(h). Id. at 350-53. In United Air Lines, Inc. v. Evans, 431 U.S. 553, 560 (1977), the Court characterized as "too narrow" a reading of §703(h) "having no application to attacks based on acts occurring after 1965," but nevertheless concluded that "[t]he statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory." In

spective prohibition of employment discrimination while protecting certain incumbent employees with vested bona fide seniority rights at the time Title VII was enacted. It did not sanction for all time an exception which could be applied to thwart "[t]he primary purpose of Title VII ... 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.'" Teamsters, 431 U.S. at 348, quoting

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29/ continued

any event, the Fourth Circuit en banc affirmed the district court's application of Evans to this case (Pet. App. 12-13), and the pending petition for certiorari does not seek review of this issue. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81-82 (1977), says no more about seniority systems than that they "are afforded special treatment under Title VII itself" in a case where the seniority system was neither intentionally discriminatory nor discriminatory in operation.

Neither Alexander v. Aero Lodge 735, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978), nor Hameed v. Iron Workers Local 396, 24 FEP Cases 352 (8th Cir. 1980), discusses either the purpose or the history of §703(h). Those cases simply do not address the question presented here.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).[30/]

II.

THE RESULT REACHED BY THE FOURTH CIRCUIT EN BANC IS ALSO SUPPORTED BY THE REASONING OF THE PANEL MAJORITY, WHICH CORRECTLY HELD THAT THE LINES OF PROGRESSION ARE NOT PART OF A "SENIORITY SYSTEM" WITHIN THE MEANING OF §703(h).

When American and the Union instituted a posting and bidding procedure for most jobs in 1968, they established an exception for jobs in nine traditionally segregated "lines of progression." 8 FEP Cases at 786. When a vacancy occurs

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30/ This objective is not "illogical." Pet. at 8. Nor is §703(h) so construed "directly contrary" to United Steelworkers of America v. Weber, 443 U.S. 193, 204 (1979). Pet. at 9-10. By parity of reasoning, the repeal of Title VII would accord the greatest immunity to employers and thus would further encourage voluntary compliance. Congress, however, chose otherwise: it is the prospect of enforcement of Title VII guarantees, as this Court has recognized, which "'provide[s] the spur or catalyst'" for voluntary compliance. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975), quoting United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973) (back pay liability); Weber, 443 U.S. at 204 (voluntary affirmative action programs not prohibited by Title VII).

in a job within such a line, only employees who have held a specified lower-level job within that line are eligible to bid on the vacancy. The requirement of experience within a line of progression operates as a prerequisite for the application of the seniority system: among the limited number of employees who satisfy this prerequisite and are therefore eligible to bid on the vacancy, branch seniority is applied to determine the successful bidder. Id. See pp.8-9 supra.

The district court found that, in six of the nine lines of progression, the experience requirement was not justified by business necessity and perpetuated the job segregation created by petitioners' prior discrimination. 8 FEP Cases at 790. Thus, under Griggs, the court correctly concluded that these requirements violated Title VII. The Fourth Circuit affirmed this finding and conclusion, 535 F.2d at 264-65, and this Court denied certiorari, 429 U.S. 920.

On appeal from the district court's subsequent denial of the motion to vacate its orders, the Fourth Circuit panel majority (Judges Winter and Butzner) held, inter alia, that §703(h) did not provide American and the Union any protection from liability for the discriminatory effects of

the lines of progression because those lines were not part of a "seniority system." 586 F.2d at 303. On rehearing en banc, the majority (Judge Phillips, Chief Judge Haynsworth, and Judge Hall) recognized that there was "considerable support" for this "possible alternative basis for decision,"[31/] but they found it unnecessary to decide the question because of their holding that §703(h) has no application to post-Title VII seniority systems. Pet. App. 8-9 n.3. Judges Winter and Butzner concurred in this part of the en banc majority opinion but also reaffirmed their prior panel opinion. Id. at 21.

It is clear from the Court's recent opinion in California Brewers Association v. Bryant, 444 U.S. 598 (1980), that this alternative basis for the Fourth Circuit's decision is dispositive. In

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31/ Prior to the rehearing en banc, American repeatedly represented to the lower courts that neither job nor line seniority was used for advancement in the lines of progresion. See, e.g., Joint Reply Brief of American, Nos. 75-1259-1263, at 18 (4th Cir. 1975) ("employees move through the lines of progression based on plant-wide seniority, not date of entry into the line of progression"); Joint Petition of American for Rehearing, Nos. 75-1259-1263, at 10 (4th Cir. 1976) ("job seniority is not used" in the lines of progression).

California Brewers this Court held that a "threshold requirement" of 45 weeks of service as a temporary employee for entry into a permanent employee seniority track was a component of a "seniority system" within the meaning of §703(h). The Court stated that,

> The 45 week rule does not depart significantly from commonly accepted concepts of "seniority." The rule is not an educational standard, an aptitude or physical test, or a standard that gives effect to subjectivity. Unlike such criteria, but like any "seniority" rule, the 45-week requirement focuses on length of employment.
>
> Moreover, the rule does not distort the operation of the basic system established by the Agreement, which rewards employment longevity with heightened benefits.

444 U.S. at 609-10.

Here, by contrast, eligibility to bid on jobs within a line of progression has nothing whatsoever to do with an employee's seniority at the company, or at any branch, or in any department, or in any job. "In the area of labor relations, 'seniority' is a term that connotes length of employment." California

Brewers, supra, 444 U.S. at 605. But here there is no requirement that the employee spend a year, a week, or even a day in the specified job: so long as the employee "ha[s] become" an assistant textile dryer operator, he or she is eligible to bid on vacancies in the textile dryer operator classification; so long as the employee is "experienced" as a catcher, he or she is eligible to bid on vacancies in the examiner-maker classification. 8 FEP Cases at 786. Because the experience requirement does not "focus[] ... on length of employment," California Brewers, 444 U.S. at 610, it "depart[s] significantly from commonly accepted concepts of 'seniority.'" Id. at 609.

This requirement also plainly "distort[s] the operation of the basic system..." Id. at 610. Under the basic system in the instant cases, the vast majority of jobs are open for bidding by all employees and are awarded to the senior bidder. The better jobs in the six lines of progression at issue, however, are excluded from this system; to exercise his or her seniority in bidding on one of those jobs, an employee must first satisfy the non-seniority experience requirement which the lower courts found to be an artificial and unnecessary barrier to advancement by black and female employees. As the Fourth Circuit recog-

nized, "[s]ince black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority." 535 F.2d at 264 (emphasis added).

As the Court cautioned in California Brewers, §703(h) must not be interpreted in a manner that

> risks swallowing up Title VII's otherwise broad prohibition of "practices, procedures and tests" that disproportionately affect members of those groups that the Act protects. Significant freedom must be afforded employers and unions to create differing seniority systems. But that freedom must not be allowed to sweep within the ambit of §703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority. There can be no doubt, for instance, that a threshold requirement for entering a seniority track that took the form of an educational prerequisite would not be part of a "seniority system" within the intendment of §703(h).

444 U.S. at 608-09.

The job experience prerequisite here, like the educational prerequisite posited in California

Brewers, departs significantly from commonly accepted concepts of "seniority." It is an artificial and unnecessary barrier to employment opportunities for blacks and women, and it is not part of any "seniority system" protected by §703(h). Accordingly, the courts below correctly concluded that it violates Title VII.

III.

NO EXCEPTIONAL CIRCUMSTANCES JUSTIFY PIECEMEAL REVIEW OF THE FOURTH CIRCUIT'S INTERLOCUTORY DECISION.

As a rule, this Court will not issue a writ of certiorari to review a non-final appellate decision which, like the Fourth Circuit's en banc decision here, remands a case to the district court for further factual and legal determinations. Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R.R., 389 U.S. 327 (1967) (per curiam). In such cases, lack of finality "of itself alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1915).

The Fourth Circuit has remanded the instant cases to the district court for determination of a series of potentially complex factual and legal

issues. See pp. 10-11 & nn.19-21 supra. Is American's branch seniority system "bona fide" and protected by §703(h) of Title VII as interpreted in Teamsters, supra? See Pet. App. 11-12. Are there "special qualifications" for American's supervisory positions, and if so, what are the appropriate statistical bases for establishing a prima facie case with respect to those positions under Hazelwood, supra? See Pet. App. 13-19. Is there rebuttal evidence under Hazelwood tending to show nondiscrimination in post-Title VII supervisory appointments and promotions? See Pet. App. 13-19. These issues, which remain to be decided by the district court, may affect American's entire non-craft, hourly paid work force in over 240 job classifications at both branches, as well as the employees in the Richmond office. See 8 FEP Cases at 791. By contrast, the question presented by the petition for certiorari affects only six lines of progression, each of which contains only two or three job classifications. See Pet. App. 32 n.6 (Widener, J., concurring and dissenting); 8 FEP Cases at 786, 789-90.

The Court generally reviews such interlocutory decisions only where "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause," American Construction Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372, 384 (1893); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584-85 (1952), or where there is a straightforward issue of law -- for example, a jurisdictional question -- that is fundamental to the continued litigation of the case. See, e.g., Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 685 n.3 (1949). There are no such exceptional circumstances here. Indeed, the advanced age of many plaintiffs and class members and their failure to obtain any monetary relief throughout the long history of this protracted litigation demonstrate why the usual rule against piecemeal review should be followed here. If certiorari is granted now, all further proceedings in the district court may well be delayed indefinitely pending this Court's

decision of the limited question presented by petitioners.[32/] Then, after several more years of litigation in the lower courts, one or more of the parties can be expected to reappear in this Court with yet another petition for certiorari. In the circumstances of this case, the Court should follow its "normal practice of denying interlocutory review." Estelle v. Gamble, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting).

32/ All proceedings on remand have been stayed pending this Court's disposition of the petition. See p. 4 n.10 supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 80-1199

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY, ET AL.,
PETITIONERS
v.
JOHN PATTERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion under Fed. R. Civ. P. 60(b)(5) in denying petitioners' motion to reopen that portion of a 1974 judgment concerning petitioners' discriminatory lines of employee progression, which were established after the effective date of Title VII of the Civil Rights Act of 1964.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1199

THE AMERICAN TOBACCO COMPANY, ET AL.,
PETITIONERS

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The en banc decision of the court of appeals is reported at 634 F. 2d 744. Earlier decisions of the court of appeals are reported at 586 F. 2d 300 and 535 F. 2d 257. The decisions of the district court are unofficially reported at 18 Fair Emp. Prac. Cas. (BNA) 371, 11 Fair Emp. Prac. Cas. (BNA) 577, and 8 Fair Emp. Prac. Cas. (BNA) 778.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1980. The petition for a writ of certiorari was filed on January 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULE INVOLVED

Section 703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(2), provides in relevant part:

> It shall be an unlawful employment practice for an employer * * * to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race * * * [or] sex * * *.

2. Section 703(c)(2) of Title VII, 42 U.S.C. 2000e-2(c)(2), provides in relevant part:

> It shall be an unlawful employment practice for a labor organization * * * to limit, segregate, or classify its membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race * * * [or] sex * * *.

3. Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), provides in relevant part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate because of race [or] sex * * *.

4. Rule 60(b)(5) of the Federal Rules of Civil Procedure provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment, order, or proceeding * * * [if] it is no longer equitable that the judgment should have prospective application.

STATEMENT

In 1973, the Equal Employment Opportunity Commission filed this employment discrimination action in the United States District Court for the Eastern District of Virginia, alleging that petitioners' promotion and seniority practices had confined blacks and women to low paid, segregated jobs, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The trial court consolidated the Commission's suit with a private Title VII class action suit filed by respondent John Patterson and four other black employees. Patterson's complaint was based on charges of race discrimination filed with the EEOC in April 1969, with regard to petitioner American Brands' two cigarette and pipe tobacco manufacturing plants in Richmond, Virginia.

In 1974, following an extensive trial, the district court entered a declaratory judgment against petitioners, concluding that their promotions and seniority practices violated Title VII. The court found that until 1963, jobs at the two plants were expressly segregated on the basis of race and sex. Blacks were relegated to low paying jobs in the prefabrication departments and were excluded from supervisory positions and better paying production jobs in the fabrication department. Likewise, women were excluded from the better paying male jobs. In 1963, the company eliminated its overt segregative assignment policy. The company continued, however, to deny blacks and women promotions into the jobs from which they had previously been excluded on an express basis. Between 1963 and 1968, the company accomplished this result by means of a standardless, subjective evaluation system supervised by white

males. In 1968, petitioners developed a posting and bidding system and established six "lines of progression." Each line of progression required that an employee work in a lower level job in that line before advancing to the next level job in the same line (8 Fair Empl. Prac. Cas. (BNA) 778, 789-790 (1974); 535 F. 2d 257, 263, 265 (1978)).

The district court determined that petitioners' promotion and seniority practices had resulted in a significant pattern of race and gender segregation similar in many respects to the pattern established by petitioners' pre-1963 policy of overt discrimination. Thus, as of 1973, eight years after the enactment of Title VII, approximately 81% and 92% respectively of the hourly-paid production workers at the two plants' prefabrication departments were black. Similarly, in 1973, only men had been employed at 55 out of the 243 production job classifications at the two plants, while only women had been employed at 12 other positions. Moreover, white males held virtually every supervisory position and the vast majority of fabrication jobs at both plants (8 Fair Empl. Prac. Cas. (BNA) at 778-795; 535 F. 2d at 263-264, 270-272). Concluding that the lines of progression had perpetuated past race and gender discrimination without a business necessity, the court enjoined petitioners from continuing to use the lines of progression (8 Fair Empl. Prac. Cas. (BNA) at 790; 535 F. 2d at 265).

2. On an initial appeal in 1976, the court of appeals affirmed the district court's findings and, with certain minor exceptions regarding the relief to be awarded, it upheld the district court's decree. The court of appeals held that the "record amply supports the district court's finding that after the effective date of Title VII [petitioners] discriminated in the[ir] promotional policies" (535 F. 2d at 264). In particular, the court of appeals agreed with the trial court that the discriminatory evaluations of white males supervisors, the

failure to provide definite job descriptions, the six unnecessary and discriminatory lines of progression, and the forfeiture of accrued seniority as a condition of transferring from one plant to the other all violated Title VII. 535 F. 2d at 263-265. The court remanded the case for individual back pay proceedings. See 18 Fair Empl. Prac. Cas. (BNA) 377 (1977). Thereafter, this Court denied petitioners' first petition for a writ of certiorari. See 429 U.S. 920 (1976).

3. Subsequently, while the case was pending on remand, petitioners filed a motion to vacate the district court's 1974 judgment.[1] Relying on *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 353-354 (1977); *United States Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), petitioners argued that their allegedly bona fide seniority systems, including the six lines of progression, did not violate Title VII. The district court denied this motion, stating that petitioners' "post January 15, 1968 seniority system * * * is not a bona fide system under *Teamsters* * * * because this system operated right up to the day of trial in a discriminatory manner * * * [and] had a discriminatory genesis" (18 Fair Empl. Prac. Cas (BNA) at 377). Hence, the court declined to modify its decree.

4. Thereafter, a panel of the court of appeals held that "*Teamsters* require[s] no modification of the relief we approved with regard to job descriptions, lines of progression * * * or supervisory appointments" (586 F. 2d 300, 303 (1978)). The court explained that those employment practices are not part of, or predicated upon, a seniority system and thus do not fall within the narrow scope of Section 703(h). The court remanded the case, however, for

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[1]Petitioner did not identify the basis for their motion. The court below treated petitioners' application as a motion under Rule 60(b)(5) of the Federal Rules of Civil Procedure. See Pet. App. 3 n.1.

further findings with regard to the bona fide nature of petitioners' seniority policy governing inter-plant transfers. The court observed that "[w]hile we agree with the district court that [petitioners'] seniority system would not be bona fide if it either currently served a racially discriminatory purpose or was originally instituted to serve a racially discriminatory purpose," the district court's conclusions regarding the inter-plant transfer seniority policy were not adequately supported by subsidiary findings. 586 F. 2d at 303.

The court of appeals then granted en banc review of this case. The en banc court held that "§703(h) * * * has no application to [petitioners'] job lines of progression policy, whether or not it be considered a 'seniority system' * * * [because] [t]his policy was not in effect at American in 1965 when Title VII went into effect" (Pet. App. 8-9). The court of appeals concluded that the "legislative history of §703(h), as exhaustively analyzed by the Supreme Court in *Teamsters* and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), conclusively demonstrates that Congress intended the immunity accorded seniority systems by §703(h) to run only to those systems in existence at the time of Title VII's effective date, and * * * to routine post-Act applications of such systems" (Pet. App. 9-10). Because the lines of progression were instituted in 1968 and thus did not create any pre-Act vested rights, the court of appeals declined to disturb this aspect of the 1974 judgment.[2]

ARGUMENT

Petitioners challenge the failure of the courts below to reopen that relatively limited portion of a 1974 judgment

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[2]The en banc court of appeals remanded the case for further proceedings regarding the inter-plant seniority policy (Pet. App. 11-12) and the promotional practice and policies governing supervisory jobs (*id.* at 13-20). These issues are not before the Court.

against petitioners concerning their so-called "lines of progression." In particular, petitioners claim (Pet. 5-21) that the court of appeals has misconstrued Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), and that these six lines of progression, which were established after the effective date of the Act and which, at a minimum, perpetuated without business justification the effects of prior overt discrimination, are lawful. It is well settled, however, that a district court has broad equitable discretion under Fed. R. Civ. P. 60(b)(5) in determining whether a prior judgment should be reopened to avoid extreme hardship or unfairness. See, *e.g.*, *Browder* v. *Director, Ill. Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978); *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932); *EEOC* v. *Safeway Stores, Inc.*, 611 F. 2d 795, 799 (10th Cir. 1979), cert. denied, 446 U.S. 952 (1980); *Fuhrman* v. *Livaditis*, 611 F. 2d 203, 204 (7th Cir. 1979). No abuse of discretion occurred here.

1. Even assuming that petitioners' six lines of employee progression fall within the narrow scope of Section 703(h),[3] petitioners are not entitled to relief under Rule 60(b)(5). As petitioners concede (Pet. 7-9), Section 703(h) encompasses

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[3]The panel of the court of appeals correctly held that these lines of progression are not seniority systems at all (586 F. 2d at 303). Petitioners' lines of progression apparently require only that an employee may not obtain a higher job in the particular line of progression until he has served at least one day in the job directly beneath the higher job in the same line of progression. This employment practice does not favor employees with greater seniority within a particular job classification, and it discriminates against employees with greater seniority, but who have worked at equivalent jobs in another line of progression or at a lower job in the same line of progression. See Pet. App. 8-9 n.3. In short, the lines of progression do not "allot[] to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 606 (1980). Moreover, as we discuss below in point 2, Section 703(h) applies solely to seniority systems established before the effective date of the Act.

only "bona fide" seniority systems that are not the products of intentional discrimination. Thus, in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court emphasized that "§703(h) does not immunize all seniority systems" (431 U.S. at 353), but rather applies only to a "bona fide" system that does "not have its genesis in racial discrimination [and that has been] negotiated * * * and maintained free from any illegal purpose" (*id.* at 356). See, *e.g.*, *Hameed* v. *International Ass'n of Bridge Workers, Local Union No. 396*, 637 F. 2d 506, 516 & n.11 (8th Cir. 1980); *Swint* v. *Pullman-Standard*, 624 F. 2d 525, 530 (5th Cir. 1980); *Sears* v. *Atchison, Topeka & Santa Fe Ry.*, Nos. 78-1995, 78-1997, 78-1998 (10th Cir. Mar. 11, 1981).

Here, the record demonstrates that petitioners' lines of progression have their origin in overt discrimination and were part of an array of discriminatory job practices designed to confine blacks and women to lower paying, segregated jobs. See 18 Fair Empl. Prac. Cas. (BNA) at 277; 535 F. 2d at 263-264; 8 Fair Empl. Prac. Cas. (BNA) at 789-795. Prior to 1963, petitioners "overtly segregated employees by race with respect to job assignments, cafeterias, restrooms, lockers, and plant entrances." 535 F. 2d at 263. Indeed, different locals of the same union represented black and white employees. Likewise, petitioners also overtly discriminated on the basis of gender at that time. Moreover, between 1963 and 1968, petitioners maintained this segregation through means of unposted job vacancies and unwritten, subjective and arbitrary job rules administered by white male supervisors. *Ibid.* Finally, in 1968, after the effective date of the Act, petitioners established lines of progression without a business justification and without definite written job descriptions, which predictably resulted in perpetuating the pattern of job segregation that had been created by petitioners' overt discrimination in the past. See 8 Fair Empl. Prac. Cas. (BNA) at 789-795; 535 F. 2d at 264.

In these circumstances, the district court properly concluded that petitioners' lines of progression are not bona fide seniority systems. See *Teamsters, supra*, 431 U.S. at 353, 356; *United States* v. *Georgia Power Co.*, 634 F. 2d 929 (5th Cir. 1981); *Swint* v. *Pullman-Standard, supra*, 624 F. 2d at 530-534. See also *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 (1979) ("adherence to a particular policy or practice, 'with full knowledge of the predictable effect of such adherence upon racial imbalance * * * is one factor * * * which may be considered by a court in determining whether an inference of segregative intent should be drawn' "). Because petitioners' lines of progression thus do not fall within the scope of Section 703(h) and because those lines of progression do not serve any business need or other important interest of petitioners, the district court correctly declined to reopen this relatively limited aspect of the 1974 judgment.

2. Furthermore, the court of appeals correctly held that Section 703(h) affords no immunity to the post-Act creation of the lines of progression at issue here, even if they are regarded as a "seniority system" within the meaning of that Section. Section 703(h) provides a limited exception to the discriminatory impact provisions of Title VII for the operation of certain "bona fide seniority * * * system[s]." On its face, however, Section 703(h) neither defines "bona fide" seniority systems nor purports to sanction the post-Act establishment of seniority systems that unlawfully "operate to 'freeze' the status quo of prior discriminatory practices" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971)). To the contrary, as this Court concluded in *International Brotherhood of Teamsters* v. *United States, supra*, after exhaustive analysis of the language and legislative history of Section 703(h), that provision reflects "the congressional judgment * * * that Title VII should not outlaw the use of *existing seniority lists* and thereby destroy or water down

the *vested seniority rights* of employees simply because their employer had engaged in discrimination prior to the passage of the Act" (431 U.S. at 353 (emphasis supplied)).[4]

Indeed, the legislative history makes clear that Section 703(h) represents a congressional compromise designed to resolve "ambiguities concern[ing] Title VII's impact on *existing* collectively bargained seniority rights * * * [by] allow[ing] for full exercise of *seniority accumulated before the effective date of the Act.*" *Teamsters, supra*, 431 U.S. at

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[4] *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), on which petitioners rely (Pet. 16-17), is not to the contrary. In *Evans*, the Court considered a seniority system that had been established prior to the effective date of Title VII, whereas the alleged seniority system challenged in this case was created after the effective date of the Act. Moreover, the *Evans* decision held only that a pre-Act seniority system, which was not itself unlawful, does not violate Title VII merely because it perpetuates post-Act discrimination that the plaintiff had failed to challenge in a timely fashion. Although the Court stated that Section 703(h) applies to seniority *decisions* made after the effective date of the Act in accordance with *pre-Act* seniority *systems* (431 U.S. at 560), it did not suggest that Section 703(h) immunizes the post-Act creation of seniority systems that perpetuate the effects of post-Act discrimination. Rather, the Court emphasized that the seniority system at issue in *Evans* did not discriminate between men and women (431 U.S. at 557-558 & n. 10), and that Section 703(h) "does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory" (431 U.S. at 560).

Likewise, petitioners erroneously rely on *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), and *California Brewers Ass'n* v. *Bryant, supra*. Those cases did not concern a seniority system established after the effective date of the Act and did not address the issue presented by this case. Likewise, there is no conflict between the decision below and the decisions in *Hameed* v. *International Ass'n of Bridge Workers, Local Union No. 396, supra*, and *Alexander* v. *Aero Lodge No. 735*, 565 F. 2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978). Not only did those cases not address whether Section 703(h) covers seniority systems created after the effective date of the Act, but the Sixth and Eighth Circuits emphasized that Section 703(h) does not in any event immunize a seniority system "established or maintained with an intent to discriminate" 565 F. 2d at 1378; see *Hameed, supra*, 537 F. 2d at 516.

352 (emphasis supplied). In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 759-761 (1976), the Court summarized the pertinent legislative history as follows (emphasis supplied; footnotes omitted):

> The initial bill reported by the House Judiciary Committee as H.R. 7152 and passed by the full House on February 10, 1964, did not contain §703(h). Neither the House bill nor the majority Judiciary Committee Report even mentioned the problem of seniority. That subject thereafter surfaced during the debate of the bill in the Senate. This debate prompted Senators Clark and Case to respond to criticism that Title VII would destroy *existing seniority systems* by placing an interpretive memorandum in the Congressional Record. The memorandum stated: "*Title VII would have no effect on established seniority rights. Its effect is prospective.*" Senator Clark also placed in the Congressional Record a Justice Department statement concerning Title VII which stated "[I]t has been asserted that Title VII would undermine vested rights of seniority. This is not correct. *Title VII would have no effect on seniority rights existing at the time it takes effect.* Several weeks thereafter, following several informal conferences among the Senate leadership, the House leadership, the Attorney General and others * * * a compromise substitute bill prepared by Senators Mansfield and Dirksen, Senate majority and minority leaders respectively, containing §703(h) was introduced on the Senate floor. Although the Mansfield-Dirksen substitute bill, and hence §703(h), was not the subject of a committee report, * * * Senator Humphrey, one of the informal conferees, later stated during debate on the substitute that *§703(h) was not designed to alter the meaning of Title VII generally but rather "merely clarifies its present intent and effect."*

Hence, nothing in the language or legislative history of Section 703(h) suggests that Congress intended to extend the protection accorded seniority systems existing at the time of the enactment of Title VII to the post-enactment creation of seniority systems that constitute "arbitrary and unnecessary barriers [which] operate invidiously to discriminate." *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431. Petitioners' unwarranted interpretation of Section 703(h) would upset the balance, established by Congress, between legitimate pre-Act seniority expectations and Title VII's overriding goal of eliminating discrimination. See also *United Steelworkers* v. *Weber*, 443 U.S. 193, 200-220 (1979); *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 774-779 (seniority expectations do not justify denial of relief to the victims of unlawful discrimination).[5]

In sum, the court of appeals correctly concluded that Section 703(h) was not meant to encourage the creation of seniority systems that " 'freeze' the status quo of prior discriminatory practices" (*Griggs* v. *Duke Power Co., supra*, 401 U.S. at 430), thereby defeating the congressional purpose underlying Title VII to eliminate "practices and devices which have fostered racially stratified job environments * * * ." *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792,

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[5]Petitioners suggest (Pet. 9-10) that the decision below would somehow affect the ability of employers and unions to modify seniority systems for the purpose of affirmative action or to respond to changes in the economy or industry. But it is well settled that employers and union may "voluntarily * * * modify a seniority system to the end of ameliorating the effects of the past * * * discrimination." *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 779. See *United Steelworkers* v. *Weber, supra*. Likewise, Title VII does not prohibit employment practices either that are required by business necessity or that do not intentionally or effectively discriminate on the basis of race or other impermissible classifications. See, *e.g.*, *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431; *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143 (1977).

800 (1973). That decision is consistent with the decisions of this Court construing Section 703(h), and does not conflict with any decision of any court of appeals. Moreover, because the lines of progression at issue here served to perpetuate the effects of post-Act discriminatory practices, the decision below was correct even if Section 703(h) might arguably be thought to afford a measure of protection to the post-Act creation of seniority systems in other circumstances. Particularly in light of the collateral nature of petitioners' Rule 60(b)(5) challenge and the strong evidence of purposeful discrimination concerning petitioners' lines of progression, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 80-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY, TOBACCO WORKERS' INTERNATIONAL UNION, AND LOCAL 182 OF TOBACCO WORKERS' INTERNATIONAL UNION,

Petitioners,

v.

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR,

Respondents.

AMERICAN BRANDS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS THE AMERICAN TOBACCO COMPANY AND AMERICAN BRANDS, INC.

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Question Presented

Whether the immunity from Title VII liability given to bona fide seniority systems under § 703(h) applies to seniority systems instituted or revised after the effective date of Title VII.*

*American Brands, Inc. has no parent, subsidiary or affiliate required to be reported under S. Ct. R. 28.1.

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Miscellaneous:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1199

THE AMERICAN TOBACCO COMPANY,
TOBACCO WORKERS' INTERNATIONAL UNION,
AND LOCAL 182 OF TOBACCO WORKERS'
INTERNATIONAL UNION,

Petitioners,

v.

JOHN PATTERSON, MARION MOSHOE,
EDMUND PAGE, JAMES RANDOLPH
AND PERCY TAYLOR,

Respondents.

AMERICAN BRANDS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS THE AMERICAN TOBACCO COMPANY AND AMERICAN BRANDS, INC.

Opinions Below

The *en banc* opinion of the Fourth Circuit as to which relief is here sought appears at 634 F.2d 744 (1980) and is reprinted in the Joint Appendix (JA 135-184). Previous opinions of the Fourth Circuit in these cases are reported at 535 F.2d 257, *cert. denied*, 429 U.S. 920 (1976) (JA 70-107) (*"Patterson I"*), and 586 F.2d 300 (1978) (JA 112-134) (*"Patterson II"*). Previous opinions of the district court are unofficially reported at 8 Fair Empl. Prac. Cas. 778 (1974) (JA 2-49) (post-trial opinion on liability); 11 Fair Empl. Prac. Cas. 577 (1974) (JA 50-69) (opinion on relief); and 18 Fair Empl. Prac. Cas. 377 (1977) (JA 109-111) (order denying motion to reconsider and vacate prior findings of liability).

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on November 18, 1980. The petition for a writ of certiorari was timely filed on January 15, 1981 and was granted on June 15, 1981.

Statutory Provision Involved

Section 703(h) of Title VII provides (42 U.S.C. § 2000e-2(h)):

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is

not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of Title 29.

Statement of the Case

These are employment discrimination cases, consolidated for trial, in which the plaintiffs alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, at two separate plants of The American Tobacco Company, a Division of American Brands, Inc. (hereinafter collectively "American") located in Richmond, Virginia. One facility, the Virginia Branch, manufactured cigarettes and the other, the Richmond Branch, manufactured pipe tobacco. Respondents John Patterson, et al., were plaintiffs in one case, a class action alleging race discrimination, and respondent Equal Employment Opportunity Commission was plaintiff in the other, alleging both race and sex discrimination.[1] American was a defendant in both cases, as was the local union (Local 182 of The Tobacco Workers' International Union).[2] The International Union was a defendant in the *Patterson* case only.

No finding of present intent to discriminate was made following the trial in 1974.[3] Evidence showed, and the courts below recognized, that commencing even prior to the enactment of

[1]Plaintiffs in the *Patterson* case alleged violations of the Civil Rights Act of 1866, 42 U.S.C. § 1981, in addition to their Title VII claims.

[2]At the direction of the court of appeals in *Patterson I*, Local 182 was dismissed in the *EEOC* case.

[3]"Even without specific proof of overt or particular acts of discrimination, the statistical evidence is more than sufficient to establish a *prima facie* case of discrimination for the two branches" (district court, JA 9); "[t]he evidence in this case upon which the district court found liability was statistical. That court did not find 'specific proof of overt or particular acts of discrimination.' The whole case must be read with that background" (Widener, J., dissenting in *Patterson II*, JA 122).

Title VII, steps had been taken to eliminate discrimination, including the merger of formerly black-white unions in September 1963 (JA 19-20, 75), elimination of segregated facilities and abolishment of departmental seniority in 1963 (JA 32, 75), cessation of discriminatory hiring (JA 9-10, 73), and affirmative efforts with regard to hiring (JA 10). Further steps were taken in January 1968[4] when a posting and bidding procedure replaced a canvassing procedure for awarding jobs under the already existing plant-wide seniority system (JA 21, 28, 76) and either nine lines of progression were "adopted" (JA 142-43 & n.4)[5] or numerous lines "were *eliminated*, except for the nine lines at issue here" (JA 162; emphasis in original).[6]

The district court found specifically that there had been no post-Act discrimination in hiring (JA 9-10). It also found that American's seniority system was "facially fair and neutral" (JA 7). Liability was premised on the basis of present effects of past discrimination which "constitute, in the Court's view, continuing violations of Title VII" (*id.*). The district court summarized its liability holding in language recognizing that much had been done to eliminate discrimination[7] and that the

[4]The charges underlying the *Patterson* case were filed in January and February, 1969, and the charge underlying the *EEOC* case was filed on April 8, 1969 (JA 6).

[5]Notwithstanding the absence of any specific finding by the district court, the majority below, *sua sponte*, found as a fact that the lines of progression first came into existence in 1968 after the effective date of Title VII. This finding was made even though the specific question as to when the lines of progression were first instituted had not been an issue at the trial, which occurred years before this Court's decisions in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) and *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598 (1980).

[6]As this language from the dissenting opinion below indicates, there is a genuine factual dispute on the current record as to whether the lines of progression indeed antedated the effective date of Title VII. Solely for purposes of this appeal, petitioners are treating the lines of progression as having come into existence after Title VII's effective date.

[7]Following the 1963 and 1968 changes, the vast majority of jobs were open for bidding by all employees and awarded to the most senior bidder, the lines of progression involving only two or three job classifications each out of the 200-plus job classifications at the plants. (*Patterson* Respondents' Brief in Opposition 27, 30).

present disparities were largely beyond American's control (JA 8-9):

> The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further implementation. As indicated in the findings of fact, however, black and female employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. *This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring.* (Emphasis added.)

The specific employment practices found violative of Title VII were two portions of American's system held to perpetuate the effects of past discrimination in hiring and job assignment[8]: (1) American's practice of separate seniority at the two plants with loss of accumulated seniority in the event of transfer and (2) six lines of progression.[9]

In *Patterson I* the Fourth Circuit affirmed this finding. It too

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[8]The district court also found that American's selection of supervisory personnel violated Title VII, a finding which the *en banc* court of appeals has now directed be reconsidered (JA 148-154). The issues concerning the selection of supervisors are not involved in this appeal.

[9]The district court found that, of nine job lines of progression, three lines were justified under the then-applicable business necessity test. The three found so justified and not part of this appeal were: (1) adjuster helper-prefabrication to adjuster-prefabrication; (2) making or packing adjuster to overhaul adjuster; and (3) learner adjuster to adjuster (JA 31-32).

Six remaining job lines of progression, however, were found unlawful because they "perpetuated past discrimination on the basis of sex and race" and did not withstand analysis under the now discredited business necessity test (*id.*). The remaining six were: (4) packing or making machine operator or Schmermund box operator to learner ad-

(Footnote continued on following page)

recognized the efforts that had been made to eliminate discrimination (JA 77):

> Although the company and the union have taken steps in recent years to correct some of the inequities of the past, the lines of progression, the lack of definite written job descriptions and barriers to transfer between the branches remain impediments to fair and neutral employment practices. Much must still be done to eradicate any taint of racial discrimination at the plant.

With respect to the lines of progression, liability was affirmed on the basis that they "perpetuated the effects of past discrimination" (JA 79) and did not meet the business necessity test with its emphasis on safety and no acceptable alternative (JA 79-80). This Court denied a petition for writ of certiorari in 1976.

Thereafter, while these cases were on remand to the district court for back pay proceedings, this Court rendered its decisions in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). Petitioners thereupon moved for relief from the prior finding of liability on the ground that it could no longer stand in light of these decisions. The district court denied relief, but in *Patterson II*, a panel of the Fourth Circuit reversed as to the practice of separate seniority at each plant and remanded for a determination whether that practice was "bona fide" within the meaning of § 703(h). However, the panel failed to include the lines of progression within the scope of that remand.

On rehearing, the court *en banc*, as had the panel, remanded for a determination whether the practice of separate seniority

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juster; (5) catcher to examiner-making; (6) line searcher-Schmermund boxer to examiner packing; (7) boiler operator to turbine operator; (8) assistant adt dryer operator to adt dryer operator; and (9) assistant textile dryer operator to textile dryer operator (JA 21-22).

at each plant was "bona fide" (JA 145-46). However, the court did not similarly remand as to the lines of progression. Although the issue whether the lines of progression were a "seniority system" and thus entitled to the same bona fides analysis under § 703(h) had been briefed and argued before the court *en banc*, the court did not decide that question. Rather, the majority of the court held that in its view "§ 703(h) simply has no application to American's job lines of progression policy, whether or not it be considered a 'seniority system' in the mode of its operation" (JA 142), and held that "the immunity accorded seniority systems by § 703(h) . . . run[s] only to those systems in existence at the time of Title VII's effective date" (JA 144).

Summary of Argument

Section 703(h) reflects the balance carefully struck by Congress between, on the one hand, the national policies reflected in Title VII of seeking the elimination of discrimination in the work place and encouraging voluntary action toward that end, and, on the other hand, the equally important national policies of fostering free collective bargaining and preserving the vital concept of seniority. This congressional balance gives seniority systems immunity from Title VII liability, absent a specific intent to discriminate. The express language of § 703(h), its unusual history, prior interpretations by this Court, and applicable policy considerations dictate that this immunity extend to *all* bona fide seniority systems, post- as well as pre-Act.

Congress used unrestricted language in § 703(h) which addresses *all* bona fide seniority systems. Had Congress meant to cover pre- but not post-Act systems, it easily could have done so. The court of appeals, however ignored the literal dictates of § 703(h) and was heedless of cardinal principles of statutory interpretation. As a result, it effectively and erroneously transformed the § 703(h) definitional provision into a "savings" or "grandfather" clause, even though it would be difficult to conceive of any more precise language Congress could have used to command coverage of both pre-Act and post-Act bona fide seniority systems.

The legislative history of § 703(h) does not support the interpretation that all seniority systems instituted or revised post-Act fall outside the ambit of the section. The isolated references to "established" and "existing" seniority in the Clark-Case and Justice Department memoranda so heavily relied on below (JA 144 & n.5) simply do not justify such a restrictive result. If anything, those memoranda, when considered in proper context, call for the opposite conclusion. In any event, because these statements do not address the specific issue presented here in unambiguous terms, they certainly are not evidence of a clearly expressed congressional intention contrary to the language of the statute itself.

When confronted with other issues of § 703(h)'s application, this Court has made it clear that the section is to be given an expansive, not restrictive, interpretation in recognition of the principle that significant freedom must be afforded employers and unions in the continuing process of collective bargaining to create and change seniority systems. *California Brewers Association* v. *Bryant*, 444 U.S. 598 (1980); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). The rule announced below would negate such freedom by compelling analysis of any post-Act seniority system solely on the basis of statistical disparate impact, regardless of the absence of any intent to discriminate. The critical elements of national labor policy encouraging the give and take of collective bargaining would thus be substantially impaired. In contrast, the holding sought herein by petitioners, which would apply § 703(h) to post- as well as pre-Act bona fide seniority systems, would preserve that freedom and be in complete harmony with Title VII's purposes and this Court's teachings that analysis of a seniority system must be premised on a search for purposeful discrimination.

In addition to the frustrating effect of the decision below on labor relations, it also will have a chilling effect on affirmative action. Post-Act changes in pre-Act seniority systems protected under § 703(h), although made to benefit persons covered by

the Act, will be discouraged because even such benevolent changes would take the system out of § 703(h). Such a result will be out of harmony with Title VII's purpose to act "as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate' " the effects of discrimination. *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 204 (1979), quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975).

ARGUMENT

I.

The Plain Language Of Section 703(h) Covers Post-Act As Well As Pre-Act Seniority Systems

A. The Court of Appeals' Holding

At stake in this case is the vitality of § 703(h) of Title VII, a provision which on its face accords immunity to all "bona fide seniority . . . system[s]," provided that differences pursuant to such systems "are not the result of an intention to discriminate." Notwithstanding such plain language, the majority of the court of appeals, after finding that the lines of progression were established after the Act's effective date, held that "the immunity accorded seniority systems by § 703(h) [runs] only to those systems in existence at the time of Title VII's effective date" (JA 144) and that "interests sought to be protected" by the provision were only "those seniority rights already vested in incumbent workers when Title VII went into effect" (*id.*; footnote omitted).

In explaining the effect of its ruling that § 703(h) has no application to seniority systems instituted after the effective date of Title VII, the majority stated that "[s]ystems initiated in the post-Act period must of course pass muster under the *Griggs*[10]

[10] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[disparate impact] analysis in the same manner as other facially neutral policies or practices challenged as discriminatory in their consequences" (JA 144 n.5).

B. The Statutory Language Does Not Permit the Restrictive Interpretation Adopted Below

The narrow interpretation by the court of appeals holding § 703(h) inapplicable to seniority practices not in place at the time of Title VII's effective date is plainly inconsistent with the express language of the section and cannot survive analysis under longstanding canons of statutory interpretation.

As in any case involving statutory construction, this Court's "starting point must be the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). A court "must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9 (1962). More often than not, there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Associations*, 310 U.S. 534, 543 (1940). "Absent a clearly expressed legislative intention to the contrary, that [express] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 100 S. Ct. 2051, 2056 (1980).

Section 703(h) provides in pertinent part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant *to a bona fide seniority . . . system* . . . provided that such differences are not the result of an intention to discriminate . . . (Emphasis added.)

The literal language of § 703(h) provides compelling evidence against the restrictive interpretation adopted below. On

its face, this definitional[11] section makes no distinction between pre- and post-Act bona fide seniority systems. Had Congress meant to cover one but not the other, it easily could have done so simply by using a phrase such as "pursuant to *an existing* bona fide seniority system." But Congress did not choose such a course. Rather, Congress chose language addressing *all* bona fide seniority systems.

Significantly, the section is couched exclusively in words of present and future tense; *i.e.*, it "*shall* not be" unlawful "*to* apply" different employment conditions "*pursuant to* a bona fide seniority . . . system" (emphasis added). The clear import of such language is that § 703(h) is prospective in operation. It is intended to apply alike to pre-Act seniority systems and systems adopted or revised by employers post-Act.

The court of appeals did not point, nor could it point, to any equivocation or lack of clarity in the terms of the section itself. Rather, the court deviated from the plain language and thereby transformed the section into a "savings" or "grandfather" clause, exempting pre- but not post-Act systems, even though "it would be difficult to conceive of any more precise language Congress could have used to command"[12] coverage of pre-Act and post-Act bona fide seniority systems.

As the dissenters below aptly observed, "Congress undoubtedly knows how to write a grandfather clause if it wishes, but in this case wrote an exception instead" (JA 160 n.1). Indeed, the same Congress drafted and passed savings provisions in other parts of Title VII.[13] Section 703(h), on the other hand, is devoid of

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[11]In *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 761 (1976), the Court stated that § 703(h) is definitional, its thrust "directed toward defining what is and what is not an illegal discriminatory practice."

[12]*Richards* v. *United States*, 369 U.S. at 9.

[13]For example, § 701(b) as enacted called for application of the "employer" definition of the Act on an annual step-down basis (78 Stat. 253 (1964):

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any such savings limitation or condition on the protection accorded "bona fide seniority . . . system[s]." The natural and unmistakable inference is that § 703(h)'s clear lack of resemblance to typical savings clauses[14] was not unintentional.

Congress accordingly used language expressing the desire that

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> *Provided*, that *during the first year after the effective date* prescribed in subsection (a) of section 716, *persons having fewer than one hundred employees* (and their agents) shall not be considered employers, and, during the *second year* after such date, *persons having fewer than seventy-five employees* (and their agents) shall not be considered employers, and, during the *third year* after such date, *persons having fewer than fifty employees* (and their agents) *shall not be considered employers* . . . (Emphasis added.)

Section 701(e), as enacted, contained a similar step-down or savings definition for "labor organization." 78 Stat. 254 (1964). Likewise, Congress easily could have utilized limiting language had it intended that all post-Act seniority systems and revisions thereto were to fall outside the ambit of § 703(h); *e.g.*, "and provided that such seniority system was in existence on the effective date prescribed by subsection (a) of section 716"; or, "provided that this section shall protect only seniority rights vested on the effective date prescribed by subsection (a) of section 716." However, Congress did not do so.

[14]Savings or grandfather clauses are "calculated to prevent hardship by saving accrued rights and interests from the operation of a new rule." 2A Sutherland, *Statutory Construction* § 47.12 (4th ed. Supp. 1980). Such clauses invariably exempt an established class from new regulation so long as that class possessed certain characteristics by a date specified in the savings clause itself. *See, e.g.*, § 7(c) of the Transportation Act of 1958, 49 U.S.C. § 303, providing that "any person (or its predecessor in interest) [who] was in bona fide operation on May 1, 1958, over any route or routes or within any territory" could apply for an authorization to continue the operation that the applicant had previously performed. In *United States* v. *Citizens & S. Nat'l Bank*, 422 U.S. 86, 108 (1975), the Court considered an archetypal savings provision to the Bank Holding Company Act, 12 U.S.C. § 1849(d), which stated:

> Any acquisition, merger, or consolidation of the kind described in section 1842(a) of this title which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to July 1, 1966, shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 of Title 15 (§ 2 of the Sherman Act).

all bona fide seniority systems be protected. This plain statutory language was simply ignored by the court below. That court was "not at liberty to imply a condition which is opposed to the explicit terms of the statute . . . To [so] hold . . . [was] not to construe the Act but to amend it." *Detroit Trust Co.* v. *The Barlum*, 293 U.S. 21, 38 (1934).[15] "After all, Congress expresses its purpose by words. It is for us to ascertain — neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam* v. *United States*, 340 U.S. 593, 596 (1951).

II.

The Legislative History Supports The Construction That Section 703(h) Protects Post-Act As Well As Pre-Act Seniority Systems

Notwithstanding the unequivocal language of § 703(h) and its dissimilarity to a savings clause, the court of appeals considered its interpretation justified by the "legislative history of § 703(h)" which it variously described as "conclusively demonstrat[ing],"[16] "replete with indications,"[17] or at least "suggest[ing]"[18] that post-Act systems were not intended to be encompassed by § 703(h). In the main, the court of appeals relied on isolated references to "established" and "existing" seniority rights in two memoranda, the Clark-Case memorandum and a Justice Department memorandum, inserted in the Congressional Record (JA 144 n.5). Yet, just as the language of § 703(h) evinces no congressional intent to confine the section's application to pre-Act seniority systems, neither does this limited "legislative history" relied on below. To the contrary, that "history" standing alone is at best ambiguous on the issue presented here and falls far short of the showing needed to disregard the words Congress expressly employed.

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[15] *See also Fedorenko* v. *United States*, 49 U.S.L.W. 4120, 4126 (1981); *Diamond* v. *Chakrabarty*, 100 S. Ct. 2204, 2207 (1980).

[16] JA 144.

[17] *Id.*

[18] *Id.* at n.5.

Furthermore, such a tunnel-visioned view of the legislative history of § 703(h) ignores other facets of the section's history, such as the date of the Clark-Case and Justice Department memoranda relative to the date § 703(h) was first proposed, the limited concern to which those memoranda were responding and other statements in addition to those focused on by the court below. Viewed in its totality, the legislative history demonstrates that in enacting § 703(h), Congress was concerned with protecting the important concept of seniority in all its numerous and varied manifestations. Thus, contrary to the conclusion of the court below, the legislative history supports the construction that the section protects *all* bona fide seniority systems, post- as well as pre-Act.

On several occasions, this Court has reviewed the circumstances preceding the adoption of § 703(h). *See Teamsters*, 431 U.S. at 350-55; *Franks*, 424 U.S. at 758-62 (noting the "unusual legislative history" of the section and "the absence of the usual legislative materials" surrounding its adoption). In so doing, the Court has referred to the Clark-Case and Justice Department memoranda as "authoritative indicators of [§ 703(h)'s] purpose." *Teamsters*, 431 U.S. at 352. But neither *Teamsters* nor *Franks* expressly considered the issue presented here and in considering that issue, these "authoritative indicators" must be seen in full context.

It must be remembered that the memoranda were introduced into the record by Senator Clark on April 8, 1964, during the general debate on the bill passed by the House. They were drafted in response to criticisms of another Senator that the bill, which contained no predecessor to the eventual § 703(h), would, *inter alia*, "undermine the vested rights of seniority." 110 Cong. Rec. 7206 (1964). But "[n]one of these documents [was] read on the floor of the Senate, and there was no discussion of their contents or of this specific seniority issue, then or thereafter." Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1610 (1969). Nearly eight weeks later, on May 26, following a number of bipartisan leader-

ship conferences, the so-called Mansfield-Dirksen amendment was offered as a substitute for the entire bill. *See* Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 445-46 (1966). One of a number of amendments appearing for the first time was § 703(h).

The particular examples in these memoranda of Title VII's effect on seniority, *i.e.*, the references seized upon below to "established" and "existing" seniority, were not intended to be exclusive. Rather, they speak of the Act's effect on "existing" and "established" seniority only because that was the specific concern to which they were addressed.[19] It was well-established when Senator Clark introduced these memoranda that the National Labor Relations Act's policy of promoting collective bargaining "in respect to . . . conditions of employment"[20] was "broad enough to cover terms of seniority." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953). Given the issue to which the memoranda were responding and the common knowledge that seniority was a mandatory subject for collective bargaining,[21] it simply was not necessary for the memoranda specifically to address seniority systems instituted or revised post-Act. This is manifested by Senator Clark's remarks immediately after placing the Justice Department memorandum in the Record stating his overall conclusion that "it is clear that the bill would not affect seniority *at all*" and "would not affect the present operation of the

[19]Senator Clark prefaced his introduction of the Justice Department memorandum into the Record by stating (110 Cong. Rec. 7206 (1964)):

> I have also had prepared by the Department of Justice a summary statement in rebuttal to the argument made by the Senator from Alabama [Mr. Hill] to the effect that Title VII would undermine the vested rights of seniority.

[20]29 U.S.C. § 159(a).

[21]*See Industrial Union of Marine and Shipbuilding Workers of America* v. *NLRB*, 320 F.2d 615, 620 (3d Cir. 1963), *cert. denied*, 320 U.S. 984 (1964) ("seniority rights . . . are within the phrase 'wages, hours, and other terms and conditions of employment' and hence are mandatory bargaining subjects" (footnote omitted)); *NLRB* v. *Proof Co.*, 242 F.2d 560, 562 (7th Cir.), *cert. denied*, 355 U.S. 831 (1957) ("[n]or can it be doubted that seniority provisions . . . are among those 'conditions of employment' which the [NLRA] requires to be subjects of collective bargaining" (citations omitted)).

National Labor Relations Act or rights under existing labor laws." 110 Cong. Rec. 7207 (1964) (emphasis added).

As stated in *Franks*, Congress plainly designed § 703(h) as a clarification or definitional provision of what is and is not an unlawful employment practice under § 703(a).[22] This being the case, if Congress' concern in § 703(h) was to protect only pre-Act seniority systems it would have required no feat of legislative drafting skill to insert the terms "existing" or "established" before the statute's descriptive phrase, "bona fide seniority or merit system." Given the fact that the drafters of § 703(h) presumably had the Clark-Case and Justice Department memoranda before them, the absence of the terms "established," "existing" or any similar term of limitation in § 703(h) is an authoritative indicator that the drafting groups, and the Congress as a whole, did not intend any such limitation.

The unusual legislative drafting process that resulted in the formulation of § 703(h) is entirely supportive of this view. There is no evidence to indicate that the bipartisan leadership drafting group's omission in § 703(h) of limiting terms such as "established" or "existing" was anything other than deliberate. As the Court recognized in *Mohasco Corp.* v. *Silver*, 100 S. Ct. 2486 (1980), Title VII as finally enacted was "carefully forged," *id.* at 2493, by the bipartisan leadership of the Senate responsible for introducing, among other provisions, § 703(h). Legislative drafting at this highest congressional level, particularly "in light of the tempestuous legislative proceedings that produced the Act," *id.*, was necessarily done with utmost attention to detail and precise use of language.

In this regard, it is instructive to note that Senator Dirksen, in presenting to the Senate the Mansfield-Dirksen amendment including the newly-drafted § 703(h), stated after describing the bipartisan leadership drafting process (110 Cong. Rec. 11935 (1964)):

As I look back now upon the time that has been devoted

[22] 424 U.S. at 761.

> to the bill, I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. *We have tried to be mindful of every word, of every comma, and of the shading of every phrase.* (Emphasis added.)[23]

Considering these unique circumstances under which § 703(h) was drafted, no court should lightly read into the provision a limitation not employed by the Congress. Instead, it should regard the words used as sound indicia that the drafting group and the Congress did not intend to limit § 703(h).

Because the isolated references pulled from a mere part of the legislative history by the court below do not address the specific issue in unambiguous terms, they wholly fail to evince any clearly expressed legislative intention contrary to the language of the statute itself. *See Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 100 S. Ct. at 2056.[24] Indeed, the talismanic quality conferred by the court of appeals on such limited legislative history pales in comparison to the numerous expressions of Congress that the Act was not intended to displace or inhibit the national policy favoring seniority.

Concern for that policy was expressed right from the start of the consideration of the Act. In the dissenting Minority Report of the House Judiciary Committee, for example, the bill was criticized because it did not include a provision specifically protecting the concept of seniority (H.R. Rep. No. 914, 88th Cong., 1st Sess., 71 (1963)):

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[23]*See also* 110 Cong. Rec. 12707 (1964) (remarks of Senator Humphrey on the bipartisan leadership drafting group's concern with precision of language).

[24]*See also United States* v. *Oregon*, 366 U.S. 643, 648 (1961) (isolated statements in the legislative history "have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute"); *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945) ("[t]he plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction").

> *Seniority is the base upon which unionism is founded. Without its system of seniority, a union would lose one of its greatest values to its members.*
>
> *The provisions of this act grant the power to destroy union seniority.* The action of the Secretary of Labor already mentioned is merely the beginning, if this legislation is adopted. With the full statutory powers granted by this bill, *the extent of actions which would be taken to destroy the seniority system is unknown and unknowable.* (First emphasis added.)

No distinction was drawn in this report between seniority accruing before the Act and that which might come into existence subsequently. Thereafter, Congressman Celler, Chairman of the House Judiciary Committee, responded to this criticism by stating that the bill would not "destroy worker seniority systems" (110 Cong. Rec. 1518 (1964)):

> It has been asserted also that the bill would destroy *worker seniority systems* and employee rights vis-à-vis the union and the employer. This again is wrong. *The bill would do no more than prevent a union, as it would prevent employers, from discriminating* against or in favor of workers because of their race, religion, or national origin. (Emphasis added.)

As in the Minority Report, Congressman Celler drew no distinction between pre- and post-Act systems.

This concern with the national policy favoring seniority continued unabated as the bill, still without a seniority provision, proceeded to the Senate and was debated in the course of a long filibuster. In a telling statement, Senator Humphrey addressed critics by assuring (110 Cong. Rec. 6549 (1964)):

> This bill is *not an instrument to abolish seniority* or unions themselves, as some have charged. The only standard which the bill establishes for unions and management alike is that race will not be used as a basis for discrimina-

> tory treatment. *The full rights and privileges of union membership, as protected by other Federal laws and court decisions, will in no way be impaired.* As a longstanding friend of the American worker, I would not support this fair and reasonable equal employment opportunity provision *if it would have any harmful effect on unions.* The truth is that this title forbids discriminating against anyone on account of race. *This is the simple and complete truth about Title VII.* (Emphasis added.)

In the same vein, Senator Kuchel remarked that "[n]either would seniority rights be affected by this act." *Id.* at 6564. Neither Senator distinguished between seniority antedating the Act and seniority post-dating the Act.

As this Court has emphasized (*United Steelworkers* v. *Weber*, 443 U.S. at 206):

> Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.'[25]

Accordingly, the statutory words must be examined in a manner that "reconstitute[s] [this] gamut of values current at the time when the words were uttered." *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 620 (1967) (quoting L. Hand, J.). Instead of the unwarranted assumptions as to Congress' intent made by the majority below from a few references in only two documents, it is much more logical to conclude from the entire legislative history that Congress, committed to "[t]he national policy favoring collective bargaining"[26]

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[25] *See also Texas Dep't of Community Affairs* v. *Burdine*, 101 S. Ct. 1089, 1096 (1981) (Title VII "was not intended to 'diminish traditional management prerogatives' ").

[26] *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 49 U.S.L.W. 4347, 4349 (1981).

and seniority,[27] intended § 703(h) to be applicable to all seniority systems and revisions thereto, whether pre-Act or post-Act. The system is protected, so long as it is bona fide and not the result of purposeful discrimination.

III.

The Holding Sought By Petitioners Logically Follows From Prior Decisions Of This Court

In addition to the plain language of the statute and the result dictated by the full legislative history, this Court has instructed in several leading opinions that § 703(h) is to be broadly interpreted and is forward-looking in its application in order to ensure that significant freedom is afforded in the creation of seniority systems. A decision reversing the court of appeals and expressly holding post-Act seniority systems and revisions thereto entitled to the protection of § 703(h) absent proof of purposeful discrimination would be fully consistent with Title VII and these previous teachings.

In *Teamsters*, although not specifically deciding the issue presented here, the Court stated that "[s]ection 703(h) on its face immunizes *all* bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination." 431 U.S. at 348 n.30 (emphasis added). Contrary to the restrictive interpretation below, the Court in *Teamsters* also appreciated that Congress' concern in enacting § 703(h) was not simply limited to seniority systems that would be frozen in place at the Act's effective date (*id.* at 355 n.41):

> [T]here is no reason to suppose that Congress *intended in 1964* to extend less protection to legitimate departmental seniority systems than to plantwide seniority systems. Then,

[27]Seniority in the collective bargaining context "lies at the core of our national labor policy," *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. at 79, and "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems." *California Brewers Ass'n* v. *Bryant*, 444 U.S. at 608.

> *as now* [1977], seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression . . . The legislative history contains no suggestion that any one system was preferred. (Emphasis added; citations omitted.)

The Court recognized that no seniority system, "then" or "now," is ever carved in stone. The essence of *Teamsters* was that "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *Id.* at 352.[28]

Moreover, the *Teamsters* Court perceived that the key to § 703(h) was that seniority systems, because specially treated by Congress, required a different mode of analysis from other employment practices in ascertaining their status under Title VII. This is because analysis of legal effect under § 703(h) requires proof of purposeful discrimination. The decision of the court of appeals to relegate post-Act seniority challenges to "the general disparate impact test laid down in *Griggs*" (JA 145), rather than apply the *Teamsters* § 703(h) analysis requiring proof of purposeful discrimination, is an erroneous return to the discredited pre-*Teamsters* line of cases that had routinely struck down seniority systems merely on the basis of perpetuation of past discrimination, regardless of the presence or absence of discriminatory motive. *See, e.g., Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).[29]

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[28]As stated in the plurality and dissenting opinions in *California Brewers*, "Title VII of the Civil Rights Act of 1964 makes unlawful, practices, procedures, or tests that 'operate to "freeze" the status quo of prior discriminatory employment practices.' [citing *Griggs*] To this rule, § 703(h) of the Act . . . provides an exception" (444 U.S. at 600) (Stewart, J.); "[t]he effect of § 703(h) is to exempt seniority systems from the general prohibition on practices which perpetuate the effects of racial discrimination" (*id.* at 618) (Marshall, J., dissenting).

[29]Under the *Local 189* approach discredited by *Teamsters*, if the employer and union could not demonstrate that the seniority system was

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In addition, the court below incorrectly construed *Teamsters* by seizing on the "routine application" terminology and giving it such a "stringent reading" (JA 143 n.4) that any post-Act change in a pre-Act seniority system denies the system of § 703(h) protection simply because its application is then no longer "routine." This reading of "routine application" is not simply "stringent"; it is plainly wrong. The phrase "routine application" as it appears in *Teamsters* simply connotes the requirement that in its operation the system "appl[y] equally to all races and ethnic groups." 431 U.S. at 355. It does not mean that a change in a system prevents "routine application" of the system after the change.

Important also is this Court's decision in *Evans*. The Court, extending the holding of *Teamsters*, precluded a Title VII challenge to a seniority system that perpetuated the effects of a discriminatory *post*-Act event which had not been the subject of a timely complaint.[30] The post-Act event, illegal termination in 1968, although perpetuated through the operation of the seniority system by rehire in 1972 without restoration of seniority credit, did not constitute a continuing violation of Title VII. Such an untimely charged event, the Court held, was "the legal equivalent of a discriminatory act which occurred before the statute was passed." 431 U.S. at 558.

Evans thus teaches that an employer who discriminated post-Act in hiring and assigning but ceases such practices and adopts a seniority system after the time expires for filing a timely complaint as to those practices should be in no different position

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justified by "an overriding legitimate, non-racial business purpose," *i.e.*, that the particular seniority system was required by considerations of "safety and efficiency," then such a system constituted on-going discrimination regardless of the presence or absence of discriminatory animus. 416 F.2d at 989, 994. *See also Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (relied on by the majority in *Patterson I* in affirming liability with respect to the lines of progression, JA 79).

[30]*See California Brewers*, 444 U.S. at 600 n.2 (summarizing *Evans* holding).

under Title VII than an employer who had a seniority system in place on the effective date of the Act. Section 703(h) should be equally applicable to the adoption of that post-Act system as to the pre-Act system. Otherwise, the lesson of *Evans* that an employer is entitled "to treat that past act as lawful after respondent failed to file a [timely] charge of discrimination," *id.* at 558, is stripped of meaning and post-Act systems become relegated to a perpetuation concept, with its focus on numbers and disparate impact, regardless of the absence of any intent to discriminate.[31]

In *Evans*, the Court squarely rejected the narrow principle announced below that § 703(h) has no application to post-Act practices (431 U.S. at 560):

> The Court of Appeals read § 703(h) as intended to bar an attack on a seniority system based on the consequences of discriminatory acts which occurred prior to the effective date of Title VII in 1965, but *having no application to such attacks based on acts occurring after 1965. This reading of § 703(h) is too narrow.* The statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory. *But such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit,* even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. *Such a result would contravene the mandate of § 703(h).* (Emphasis added; footnote omitted.)

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[31]To the extent liability was imposed in the instant case premised on perpetuation of the effects of a discriminatory act antedating the 1968 changes, *Evans* makes clear that such perpetuation could not be the basis of challenging the seniority system as a continuing violation, because such act had not been made the subject of a timely complaint under the 90-day rule then applicable (*see* n.4, *supra*). Section 706(d), 78 Stat. 260, 42 U.S.C. § 2000e-5(d) (current version at 42 U.S.C. § 2000e-5(e) (180-day rule)).

By construing § 703(h) as a "quite narrow exception" (JA 143 n.4) of no applicability to post-Act seniority practices, the court of appeals below committed the same fundamental error in approach to § 703(h) as that squarely rejected by this Court in *Evans*.

Equally supportive of the position that post-Act seniority practices should be within the scope of § 703(h) is *Trans World Airlines, Inc.* v. *Hardison*. The Court emphasized, without differentiating between pre-Act and post-Act practices, that "seniority systems are afforded special treatment under Title VII itself." 432 U.S. at 81. There was no suggestion, as baldly stated by the Fourth Circuit in this case, that a *Griggs* analysis would apply to post- but not to pre-Act seniority practices. Instead, *Hardison* coalesced the earlier teachings of *Teamsters* and *Evans* (432 U.S. at 82 & 82-83 n.13):

> Absent a discriminatory purpose, the operation of a *seniority system* cannot be an unlawful employment practice *even if the system has some discriminatory consequences.*
>
> . . . .
>
> . . . § 703(h) unequivocally mandates that *there is no statutory violation in the absence of a showing of discriminatory purpose. See United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558-560 (1977). (Emphasis added.)

The expansive interpretation of § 703(h) followed in *California Brewers* is also instructive. Therein, the Court made it clear that the term "seniority system" in § 703(h) should be liberally, not narrowly, construed (444 U.S. at 608):

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's *long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment.* It does not behoove a court to second-guess either that process or its products. Seniority systems, reflecting as they do, not only

> the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. (Emphasis added; citations omitted.)

Because seniority systems "inevitably come in all sizes and shapes," *id.*, the definitional thrust of the term "seniority system" in § 703(h) was designed by Congress to be forward-looking, and not static. "Significant freedom," *California Brewers* stated, "must be afforded employers and unions *to create* differing seniority systems." (*Id.*; emphasis added.) Such freedom would be illusory if any seniority system or revision thereto initiated after the Act was subject to *Griggs* analysis rather than to bona fides analysis under *Teamsters*.[32]

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[32]Not one circuit has agreed with the Fourth Circuit in holding seniority systems instituted or revised post-Act subject to *Griggs* analysis. Two circuits have analyzed such systems for presence or absence of bona fides and purposeful discrimination. In *Hameed* v. *International Ass'n of Bridge, Etc., Local 396*, 637 F. 2d 506 (8th Cir. 1980), the Eighth Circuit held that a referral seniority system initiated post-Act in a 1972 collective bargaining agreement "must be judged" under *Teamsters* and *Evans*, which "immunize bona fide seniority systems which have a disproportionate impact on blacks or other minorities, provided that any disparity is not the result of intentional discrimination." *Id.* at 516 (footnote and citations omitted). The *Hameed* court properly appreciated that for plaintiffs to prevail on the 1972 referral seniority system issue, "proof of discriminatory motive is critical." *Id.* Contrary to the approach of the Fourth Circuit, the Eighth Circuit correctly observed that "even if a disproportionate impact had been shown, the seniority system would not have been shown to be a prima facie violation of title [*sic*] VII because *Teamsters* immunizes seniority systems from attack under the disproportionate impact theories of *Griggs*." *Id.* at 517 n.12. In *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978), the Sixth Circuit drew no distinction for § 703(h) purposes between pre- and post-Act seniority practices, and analyzed the latter under the bona fides test.

Moreover, numerous district courts post-*Teamsters* have likewise reviewed post-Act seniority systems under bona fides analysis, requiring proof of discriminatory intent in the adoption or maintenance of a seniority system as a prerequisite for a finding of non-bona fides. *See, e.g., Johnson* v. *Burroughs Corp.*, 24 Fair Empl. Prac. Cas. 963 (S.D. Fla. 1980) (seniority system instituted in 1974 at a plant which did not

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In sum, the critical principle gathered from this Court's prior decisions is that seniority systems, whenever adopted or revised, are given special treatment by Title VII itself. The statement by the majority below that § 703(h) is a "quite narrow exception to Title VII's general coverage of all 'conditions of employment' " (JA 143 n.4) is simply beside the point. Although § 703 (h) applies to relatively few employment practices covered by Title VII, it does not follow that when an employment practice involves a seniority system, the protection provided by the section is to be narrowly applied. *Teamsters, Evans, Hardison* and *California Brewers* all instruct that when a seniority system comes within the ambit of the section, the section is to be liberally, not narrowly, construed.

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open until 1968 analyzed for bona fides under § 703(h)); *Sanders* v. *Sherwin Williams Co.*, 495 F. Supp. 571 (E.D. Mich. 1980) (pre-Act practices and post-Act revisions to seniority system analyzed for bona fides under § 703(h) notwithstanding claim of disparate impact); *Pate* v. *Transit District*, 21 Fair Empl. Prac. Cas. 1228, 1245 (N.D. Cal. 1979) ("[t]he seniority system *created* by collective bargaining agreements in effect . . . *during the period from 1968 through 1976*, because it applied equally to employees of all races, and was neither created nor maintained with a discriminatory purpose, was a *bona fide* seniority system" under § 703(h)(emphasis added)); *Edmondson* v. *United States Steel Corp.*, 20 Fair Empl. Prac. Cas. 1745 (N.D. Ala. 1979) (previous court-ordered seniority system established in May 1973 ruled bona fide under § 703(h) over claim of adverse impact); *Freeman* v. *Motor Convoy*, 20 Empl. Prac. Dec. ¶ 30,090, p.11,493 (N.D. Ga. 1979) (seniority system adopted in 1969 "when the shop and yard employees were organized" referred to a master for determination of bona fides under § 703(h)); *Edmonds* v. *S. Pac. Transp. Co.*, 19 Fair Empl. Prac. Cas. 1052 (N.D. Cal. 1979) (challenges to pre- and post-Act seniority system practices analyzed under the bona fides test of § 703 (h)); *Griffin* v. *Copperweld Steel Co.*, 22 Fair Empl. Prac. Cas. 1112 (N.D. Ohio 1978) (post-Act revisions to seniority system reviewed for § 703(h) bona fides); *EEOC* v. *McCall Corp.*, 24 Fair Empl. Prac. Cas. 432 (S.D. Ohio 1978), *aff'd sub nom., EEOC* v. *McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980) (1966 adjustment of line of progression incorporating workers without carryover seniority and challenged under perpetuation theory held bona fide under § 703(h) absent a showing of discriminatory purpose).

IV.

Unless Corrected, The Rule Announced Below Will Have A Chilling Effect On Labor Relations And Affirmative Action

Under the rule announced below, any new seniority system, or a post-Act revision to a pre-Act system, proposed in collective bargaining would have to withstand the difficult *Griggs* disparate impact analysis with its primary reliance on statistics[33] and its related burden of establishing a business necessity defense.[34] Management and labor would first have to be sure that the racial and sexual breakdown within departments, lines of progression or other seniority units mirrored the relevant statistics before the seniority practice could be implemented. Absence of discriminatory intent would be meaningless. Mere statistical disparity would defeat the proposal and a numbers game would become the substitute for the "[s]ignificant freedom [which] must be afforded employers and unions to *create* differing seniority systems." *California Brewers*, 444 U.S. at 608 (emphasis added).[35] The critical elements of national labor pol-

[33]Plaintiff in a case alleging disparate impact invariably establishes a *prima facie* case through a statistical showing of imbalance. *See, e.g., United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). The district court *sub judice* accepted this procedure (*see* n.3, *supra*).

[34]Lower courts have held defendants to exacting standards under the business necessity test, *see United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971) and pre-*Teamsters* courts rarely upheld a seniority system pursuant to claims of business necessity. *See, e.g., United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 451 (5th Cir. 1971), *cert. denied sub nom., Brotherhood of Locomotive Engineers* v. *United States*, 406 U.S. 906 (1972) (" '[t]o be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals,' " quoting *United States* v. *Bethlehem Steel Corp.*, 446 F.2d at 662). In the case at bar, the district court imposed the business necessity test (JA 9, 28, 32), as did the court of appeals (JA 79-80).

[35]Such a result would be contrary to the essence of collective bargaining, which is that "it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static." *Aeronautical Indus. Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 525 (1949).

icy recognizing "the give and take of free collective bargaining [and] the specific characteristics of a particular business or industry," *id.*, would thus be substantially impaired.

These results would follow notwithstanding that a key aspect of national labor policy, reflected in statutes governing relationships between employers and unions,[36] "encourages the negotiation of terms and conditions of employment through the collective-bargaining process." *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 49 U.S.L.W. 4347, 4349 (1981); *see also Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 62 (1975) (recognizing the national labor policy "encouraging the practice and procedure of collective bargaining"). That collective bargaining process invariably includes negotiation of seniority provisions, as "[s]eniority has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey* v. *Moore*, 375 U.S. 335, 346-47 (1964); *see also Franks*, 424 U.S. at 766.[37]

As the Minority Report of the House Judiciary Committee recognized, seniority is "the base upon which unionism is founded." H.R. Rep. No. 914, 88th Cong., 1st Sess., 71 (1963). But seniority is not simply of overriding importance to unions and employees alone. Employers also have a vital interest in seniority and in re-shaping seniority systems on an on-going basis to maximize efficiency and minimize costs of production (U.S. Dep't of Labor, Bulletin 908-11, *Collective Bargaining Provisions*—Seniority, 14 (1949)):

> Management customarily prefers narrower seniority units, preferably by job classification or department, in order *to*

[36] *E.g.*, the National Labor Relations Act of 1935, 29 U.S.C. § 151 *et seq.*; the Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.*

[37] In *Franks* the Court noted that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast *and increasing importance* in the economic employment system of this Nation," 424 U.S. at 766 (emphasis added), citing to S. Slichter, J. Healy, & E. Livernash, *The Impact of Collective Bargaining on Management*, 104-115 (1960).

> *establish competition between the same skills, to prevent excessive displacement of workers and numerous transfers* from one department to another, *and to eliminate high training costs.* The types of seniority incorporated in agreements probably reflect attempts to reconcile the view that the wider unit gives the greatest protection with the belief that *some kind of limitation on departmental, occupational, or geographic lines is necessary for productive efficiency.* (Emphasis added.)[38]

There are myriad legitimate reasons, then, why new or revised seniority systems may be proposed at the bargaining table. There are equally as many legitimate considerations that shape the end result, including the different perspectives of management and labor, their relative bargaining strengths and the number and relative importance of other matters that are up for consideration at the same time.[39] Absent significant freedom to bargain over such issues, the give and take essential to the collective bargaining process is curtailed.

Congress, in adopting Title VII, was certainly aware of the national labor policy encouraging such free collective bargaining and recognizing the importance, diversity and changing nature of seniority practices. The decision below turns this critical policy on its head by commanding application of a harsher legal standard to post-Act seniority systems and revisions.[40] If

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[38]*See also* Slichter, et al., *supra* at 181, wherein Professor Slichter observed in 1960: "Although management once felt that promotion decisions were one of its most important prerogatives, it is now coming to realize that proper use of the seniority criterion in these decisions is not necessarily incompatible with efficiency and employee morale."

[39]As this Court recognized as long ago as 1949, "[t]here are great variations in the use of the seniority principle through collective bargaining." *Aeronautical Indus. Dist. Lodge 727* v. *Campbell,* 337 U.S. at 526.

[40]Should the result below prevail, the fear of the dissenting Minority Report of the House Judiciary Committee that Title VII would *"grant the power to destroy union seniority"* would surface and "[s]eniority [as] the base upon which unionism is founded" would be undermined. H.R. Rep. No. 914, 88th Cong., 1st Sess., 71 (1963) (emphasis in original).

adopted here, it would deny the fact that seniority provisions "assume an almost infinite variety" and must constantly be adopted and altered "to meet changing or unforeseen situations." Aaron, *Reflections On The Legal Nature And Enforceability Of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962).

Furthermore, the inevitable result of the pre-Act/post-Act dichotomy in the applicable analyses under § 703(h) would have an unfortunate, damaging effect on affirmative action. The majority below held § 703(h) inapplicable to all post-Act seniority system "change[s] and formalization[s] (*whether in favor of or against employee interests*)" (JA 143 n.4; emphasis added). As a consequence, good-faith changes in pre-Act seniority systems made after the effective date of Title VII, even though they benefit persons covered by the Act, will be discouraged because such a change would consign the system to a *Griggs* analysis and make valueless a laudatory intent to lessen or eliminate discriminatory effects. Pre-Act systems will be retained unchanged in order to preserve § 703(h) protection and its bona fides analysis pursuant to *Teamsters*.

Such a result would be contrary to this Court's observation in *Franks* that (424 U.S. at 779):

> the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority,' is certainly no less than in other areas of public policy interests. *Pellicer* v. *Brotherhood of Ry. & S.S. Clerks*, 217 F.2d 205 (CA5 1954), cert. denied, 349 U.S. 912 (1955). See also Cooper & Sobol, 82 Harv. L. Rev., at 1605.

A decision affording § 703(h) protection to post-Act seniority systems and revisions thereto provided they are not made with an intent to discriminate would provide an incentive to employers and unions to modify seniority practices for the purpose

of furthering the important national interest in eliminating discriminatory effects in the workplace.[41]

Until the decision below, *Teamsters* and *Evans* could be logically read to provide employers and unions with this powerful incentive today to consciously adopt or revise seniority practices in an effort to ameliorate any effects of past discrimination, be they pre-Act or post-Act effects, without fear of losing the statutory protection of § 703(h). A rule stripping any post-Act seniority modification of this statutory protection and relegating good faith seniority changes to the burdensome analysis of *Griggs* will discourage such attempts to broaden employment opportunities.

This unfortunate effect of the court of appeals' rule was correctly pointed out by the dissenters, who noted that even a post-Act change made "in favor of a class of black employees, will deprive the company and the union making the change from the benefit of a § 703(h) exemption" (JA 183). Such prohibitive effect of the majority's ruling runs directly contrary to this Court's observation in *United Steelworkers* v. *Weber*, 443 U.S. at 204 (citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 418 (1975)), that Title VII is "intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to

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[41] *See United States* v. *City of Miami, Fla.*, 614 F.2d 1322, 1341 (5th Cir. 1980):

> To say that a seniority system is immunized from attack means that the employer cannot be forced against its will to modify the system, not that the employer cannot agree to change it.
>
> . . . Just as a collective bargaining agreement may, for the purpose of furthering public policy interests beyond what is required by statute, enhance the seniority status of certain employees even though to some extent this will be detrimental to the expectations of other employees [citing *Franks*], so may an employer voluntarily consent to changes in seniority provisions that do not abridge contractual, statutory or constitutional rights of its employees or their bargaining agent to further important public policy interests.

eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' "[42]

The restrictive principle announced below impedes collective bargaining in the important area of seniority. It inhibits management and labor from adopting employment practices to meet a changing economy or industry. It jeopardizes hundreds of diverse seniority systems established or revised in American industry in the sixteen years since Title VII's enactment. It puts a significant damper on good faith efforts made in the spirit of affirmative action to overcome vestiges of past discrimination. It must be rejected.

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[42]The dissent recognized this conflict with *Weber* (JA 184):

> That part of the majority opinion providing that a company and a union cannot alter a seniority system so as to make more favorable the conditions of employment of minority employees is directly contrary to *Weber*, I think. It requires a too strained construction of the statute to hold that a seniority system admittedly discriminatory in effect, as in *Teamsters*, is protected by § 703(h) so long as it remains unchanged, but if it is changed in favor of the minority employees, then the employer and the union lose their § 703(h) exemption.
>
> . . . Such a conclusion, I suggest may sound astonishing, yet that is precisely what the majority holds.

CONCLUSION

For these reasons, the decision of the court of appeals should be reversed and the case should be remanded for a determination whether the lines of progression are bona fide under § 703 (h) and not the result of an intention to discriminate.

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No. 80-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE AMERICAN TOBACCO COMPANY, *et al.*,
Petitioners,

v.

JOHN PATTERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONERS BAKERY, CONFECTIONERY AND TOBACCO WORKERS INTERNATIONAL UNION AND ITS LOCAL 182

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QUESTION PRESENTED

Whether the immunity from Title VII liability given to bona fide seniority systems under § 703(h) applies to seniority systems instituted or revised after the effective date of Title VII.

LIST OF PARTIES

A complete list of the parties to this action appears on the caption of the petition. Specifically, the petitioners are:

The American Tobacco Company, a division of American Brands, Inc.
American Brands, Inc.
Bakery, Confectionery & Tobacco Workers International Union (the successor to Tobacco Workers' International Union, which merged with Bakery & Confectionery Workers International Union to form the presently-named union in 1978)
Local 182 of Bakery, Confectionery & Tobacco Workers International Union.

The respondents are:

John Patterson
Marion Moshoe
Edmund Page
James Randolph
Percy Taylor
Equal Employment Opportunity Commission

The first five named respondents were certified by the district court to represent a class of black employees of American Tobacco Company.

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BRIEF FOR PETITIONER UNIONS

This brief is the joint product of petitioners Bakery, Confectionery & Tobacco Workers International Union [1] and its Local 182 (hereinafter collectively "the Union"), and American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation of national and international unions with which the Union is affiliated. The decision to file a single brief reflects the identity of their views on the issue presented, and their desire to minimize the burdens on the Court by stating their common position only once.

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[1] This suit was instituted against, *inter alia*, Tobacco Workers International Union and its Local 812. In 1978, Tobacco Workers International Union merged with Bakery & Confectionery Workers International Union to form the present Bakery, Confectionery & Tobacco Workers International Union

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Fourth Circuit which this Court has granted certiorari to review is reported at 634 F.2d 744, and the panel opinion that it replaced is reported at 586 F.2d 300. An earlier opinion of the Court of Appeals in this case is reported at 535 F.2d 257, *cert. denied*, 429 U.S. 920. Opinions of the district court in this case are reported at 8 FEP 778 (1974), 11 FEP 577 (1974), and 18 FEP 377 (1977). All of the afore-cited opinions are reprinted in the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1980. The petition for writ of certiorari was filed on January 16, 1981, and granted on June 15, 1981. This Court has jurisdiction to review the decision below pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c), provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), provides in pertinent part as follows:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

Petitioner Local 182 is the exclusive bargaining representative of employees at a number of plants of Petitioner American Tobacco Company, including two separate plants in Richmond, Virginia, which are the subject of this action: the Virginia Branch (at which cigarettes

are manufactured), and the Richmond Branch (at which pipe tobacco is manufactured). Two separate actions were filed challenging employment practices at these plants; one by the EEOC, and the other by five black employees who were certified to represent a class of black employees at the plants. The actions were consolidated.

The case was initially tried prior to this Court's decision in *Teamsters v. United States*, 431 U.S. 324, at a time when the rule in the Fourth Circuit was that Title VII invalidated innocently-motivated seniority systems that perpetuated the effects of pre-Act discrimination (unless proved by the defendants to be a "business necessity"). *Robinson v. Lorillard Corp.*, 444 F.2d 791 (CA 4, 1972), *cert. dismissed*, 404 U.S. 1006. The district court found that pre-Act discrimination was being unlawfully perpetuated by the "facially fair and neutral" seniority system in two respects: (1) seniority was measured by length of service within one's branch ("branch length of service"), which deterred black employees from transferring from one branch to the other, and (2) there were six lines of progression (LOPs) that were not justified by business necessity and that, by requiring employees to promote job-by-job, delayed the access of black employees to the jobs at the top of these LOPs. JA 2-11.[2] The court of appeals affirmed these rulings, but remanded for further proceedings respecting remedy. JA 70-83. On remand, the district court entered a judgment requiring, *inter alia*, that blacks be permitted to carry their seniority when transferring from the prefabrication department of one branch to the fabrication department of the other, and that the six LOPs be eliminated. JA 138.

Following entry of that judgment, this Court decided *Teamsters*, and the Company and Union moved under

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[2] There were nine LOPs, but the district court found that three were justified by business necessity. JA 31-32.

F.R.Civ.P. 60(b) for relief from the judgment. The district court denied the motion. JA 109-110. On appeal, a panel of the court below ruled (1) that the question of the legality of the contractual use of branch length of service as the measure of seniority required, in light of *Teamsters*, more explicit findings from the district court (which was free to reopen the record to receive further evidence as to *bona fides*), JA 117-118, but (2) that the lines of progression were not part of a "seniority system" within the meaning of § 703(h), so that the original holding that they were unlawful irrespective of motivation remained proper and was not vulnerable to a Rule 60(b) motion, JA 116.[3]

The Company and Union filed petitions seeking rehearing *en banc*. While those petitions were pending, this Court decided *California Brewers Assn. v. Bryant*, 444 U.S. 598, giving a broader reading to the term "seniority system" than had been applied in the panel decision.

The *en banc* court ruled unanimously that on the question of the legality of the use of branch length of service as the measure of seniority the case had to be remanded and the record reopened to receive further evidence as to *bona fides*. JA 145-147. That ruling is not before this Court. The ruling which *is* before this Court is that relating to the LOPs.

The majority of the *en banc* court held that the LOPs were unlawful whether or not they were innocently motivated, and whether or not they were part of a "seniority system" within the meaning of § 703(h) (a question the majority did not address, JA 142-143, n. 3), because they were "adopted in January 1968," JA 143. The court reasoned that § 703(h) is "a quite narrow exception to Title VII's general coverage of all 'conditions of employment' ", JA 144, n. 4, and "[i]n line with that narrow interpretation" (*ibid.*) the panel majority

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[3] Judge Widener dissented from the ruling respecting lines of progression, JA 122-125.

concluded "that the legislative history of § 703(h) . . . conclusively demonstrates that Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act applications of such systems," JA 143-144.

Judge Widener, joined by Judge Russell, dissented. Preliminarily, he noted his doubt as to the correctness of the majority's holding that § 703(h) is inapplicable to seniority systems adopted subsequent to enactment of Title VII:

> The Supreme Court has specifically noted in *Teamsters* that § 703(h) on its face immunizes all bona fide seniority systems. 431 U.S. 348, n. 30. Although § 703(h) is written as an exception and not as a grandfather clause, the majority transforms an ordinary exception into just that. Congress undoubtedly knows how to write a grandfather clause if it wishes, but in this case wrote an exception instead. New plants, for instance, are summarily excluded from § 703(h) in the majority view, without stated justification." [JA 160, n. 1].

But the principal focus of his dissent was to the adequacy of the record to support the majority's finding that the LOPs were "adopted in 1968". He noted that the district court had made no findings on the point (JA 161), that the record evidence appeared to indicate that a much larger number of LOPs (including these six) had existed in practice prior to the Act (albeit not expressly prescribed in the collective bargaining agreement), and that in 1968 the parties had substantially reduced the number of LOPs, with these six being among the few surviving (JA 162-177). If this is correct, he noted, the 1968 "change" benefited the black employees, for it reduced the number of LOPs without creating any new ones (JA 165-166, 182). In his view, a remand was necessary so that the district court could make findings in

the first instance as to whether that was the correct reading of the record (JA 177).

The majority appended a footnote to its opinion explaining its reasons for rejecting the dissent's proposal of a remand on this factual issue:

> Without attempting here an exhaustive counter-analysis of the factual record, our perception is that while the informal rudiments of what is now described as a "job lines of progression policy" certainly existed before 1965, the stated procedures adopted by American in 1968 to control entry into and promotions within specifically identified job "lines" involved enough of change and formalization (whether in favor of or against employee interests) to constitute a *new* policy, or at least one so radically altered from prior unstructured procedures that it could not be considered simply a "routine application," see *Teamsters*, 431 U.S. at 352, of those pre-1965 procedures. [JA 143, n. 4; emphasis in original].

The majority's implicit acknowledgment that the only "change" in 1968 may have been one "in favor of" the interests of minority employees, coupled with its holding that that "change" withdrew the "immunity" of § 703(h), drew a rebuttal from Judge Widener:

> The only way the majority can find liability on this record without further fact finding by the district court is by giving such a "stringent reading" [of § 703(h)] against the employer and the union that it actually finds liability when all the employer and the union tried to do was to improve the existing conditions for the plaintiff class . . . for it must be remembered that *each relevant change in the collective bargaining agreements disclosed in this record, whether pre- or post-act, has benefited the plaintiff class. None have been to its detriment.*
>
> . . . [T]he majority boldly holds that a change in a previously existing seniority system, although the

change may be in favor of a class of black employees, will deprive the company and the union making the change from the benefit of a § 703(h) exemption.

Nothing I can think of could be less founded either in law or logic. [JA 182-183; emphasis in original].[4]

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[4] Judge Widener explained:

> The law . . . rejects this conclusion in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), in which the holding of the court was that it was not a violation of the 1964 Civil Rights Act for an employer and a union to agree to a preference for minority employees. The court said that the act is "intended as a spur or catalyst to cause employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." 443 U.S. at 204. Thus, *Weber* approved actions by employers and unions designed to alleviate previously existing discriminatory conditions of employment. That part of the majority opinion providing that a company and a union cannot alter a seniority system so as to make more favorable the conditions of employment of minority employees is directly contrary to *Weber*, I think. It requires a too strained construction of the statute to hold that a seniority system admittedly discriminatory in effect, as in *Teamsters*, is protected by § 703(h) so long as it remains unchanged, but if it is changed in favor of the minority employees, then the employer and the union lose their § 703(h) exemption.
>
> Not only is this conclusion contrary to logic and law, it is a blow against minority employees and contrary to the purpose of the statute. Hereafter, in this circuit at least, neither an employer nor a union may safely agree to any change in a seniority system existing before July 1, 1965 for fear that its § 703(h) exemption will be lost. Thus, a seniority system as rigid as the one approved in *Teamsters*, which protects a group of white employees, under the provisions of § 703(h), will receive the sanction of the statute and the blessings of this court, while a seniority system equally as rigid but which by the action of the employer and the union has, since July 1, 1965, ameliorated a part of the previously existing discriminatory conditions, will not. Such a conclusion, I suggest may sound astonishing, yet that is precisely what the majority holds. [JA 183-184].

INTRODUCTION AND SUMMARY OF ARGUMENT

A majority of the court below has held that § 703(h) of Title VII of the Civil Rights Act of 1965 applies only to seniority systems "in existence at the time of Title VII's effective date," and that systems negotiated after that date (or, as here, changes after that date in pre-existing systems) even if innocently motivated are unlawful if they perpetuate pre-Act discrimination. No other lower court has adopted that construction of § 703(h), and numerous lower court decisions have applied § 703(h) to protect post-Act systems and changes absent discriminatory intent.[8] Those decisions and not the decision below are faithful to Congress' intent.

We begin our argument by showing that the lower court's narrow reading of § 703(h) cannot be squared with the carefully crafted statutory language Congress wrote, which protects without qualification "bona fide seniority . . . systems" that are "not the result of an intention to discriminate."

We then demonstrate that, contrary to the court of appeals' supposition, the Congressional discussions concerning Title VII's effect on seniority confirm that § 703(h) should be read to mean what it says. There is not a single instance in which a proponent of the bill said

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[8] *Hameed v. International Ass'n. of Bridge, Etc., Local 396*, 637 F.2d 506 (8th Cir. 1980); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); *EEOC v. McCall Corp.*, 24 FEP Cases 432, (S.D. Ohio 1978), *aff'd sub nom., EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980); *Johnson v. Burroughs Corp.*, 24 FEP Cases 963 (S.D. Fla. 1980); *Sanders v. Sherwin Williams Co.*, 495 F.Supp. 571 (E.D. Mich. 1980); *Pate v. Transit District*, 21 FEP Cases 1228, 1245 (N.D. Cal. 1979); *Edmondson v. United States Steel Corp.*, 20 FEP Cases 1745 (N.D. Ala. 1979); *Freeman v. Motor Convoy*, 20 Empl. Prac. Dec. ¶ 30,090, p. 11,493 (N.D. Ga. 1979); *Edmonds v. S. Pac. Transp. Co.*, 19 FEP Cases 1052 (N.D. Cal. 1979).

what the lower court held: that § 703(h) does not protect post-Act seniority systems. Rather, Title VII's supporters responded both broadly and specifically to the charge that the legislation would destroy existing seniority rights. In virtually every instance, the response was broad and unqualified: the bill would have no effect on seniority systems. In the written materials submitted by Senator Clark relied on by the court below, the response was tailored to the charge: the claim that the bill would affect existing seniority rights was false; the bill would *not* affect existing seniority rights. But the totality of Senator Clark's statements leaves no doubt that he did not intend to draw a distinction between existing and future seniority rights. Indeed, Senator Clark explained that he had introduced the very materials upon which the court below relied to make "clear that the bill would not affect seniority at *all*" (110 Cong. Rec. 7207; emphasis added). Each one of Title VII's proponents who addressed the subject affirmed Senator Clark's assurance that the bill would not affect seniority.

We conclude with a demonstration that the decision below, by imposing stiff penalties on employers and unions that make step by step changes in a pre-Act seniority system (even in a manner that benefits minorities and women), frustrates both Title VII's purpose to spur voluntary affirmative action and the natiornal labor policy granting employers and unions flexibility to structure seniority systems to their evolving needs. As this Court has recognized, Congress intended that Title VII not intrude upon these important legislative policies.

ARGUMENT

1. The Statutory Language.

Section 703(h) is "a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758.[6] By its terms, § 703(h) extends immunity without qualification to "bona fide seniority . . . system[s]" that are "not the result of an intention to discriminate". The language of § 703(h) draws no distinction between seniority systems negotiated before the Act and seniority systems negotiated after the Act. It is hardly likely that Congress in a "definitional provision" would choose words of universality if all that was intended was a "grandfathering" of pre-existing seniority systems.

The unlikelihood that Congress' words are so at variance with its intent is magnified when the circumstances of the drafting of § 703(h) are recalled. Section 703(h) was a part of the "Dirksen-Mansfield" substitute which broke the longest filibuster in American history. Senator Dirksen explained that the substitute "represents not merely weeks but months of labor" (110 Cong. Rec. 11935), and concluded:

> I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase. [*Id.* at 11935].

Finally, the argument that § 703(h) means what it says is made more binding by the abundant evidence that Congress is no novice at drafting "grandfather" clauses. Such provisions are common in federal legislation, in-

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[6] See also *Teamsters*, 431 U.S. at 346-347; *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82.

cluding labor legislation.[7] It is utterly improbable that Congress would have failed to employ traditional "grandfather" language if that is all that was intended by § 703(h).[8]

2. The Legislative History.

(a) There is not a single statement in all of Title VII's legislative history that says what the court below has held, i.e. that § 703(h) does *not* protect seniority systems adopted or changed after July 2, 1965. And as this Court has emphasized, "[a]bsent a clearly expressed legislative intention to the contrary" the language of the statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108. The absence of such a statement is, we submit, dispositive, and the lower court's refusal to accord § 703(h) its plain meaning is plain error. Nonetheless in what is perhaps an excess of caution we demonstrate that the court of appeals erred not only in its approach, but in its reading of the legislative materials.

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[7] See, for example, the "grandfather" language in § 102 of the Labor Management Relations Act (LMRA), Ch. 120, § 102, 61 Stat. 152 (1947), immunizing certain practices undertaken pursuant to pre-Act collective bargaining agreements which would otherwise have been unfair labor practices under the terms of the Act. See also, § 302(f) of the LMRA (29 U.S.C. § 186(f)), and §§ 2(a), 9 and 12 of the Portal-to-Portal Act (29 U.S.C. §§ 252(a), 258 and 261).

[8] An additional aid to statutory construction is furnished by the fact that § 703(h) legitimatizes in a single phrase all differences resulting from "a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production." It hardly seems likely that Congress intended to exempt only those merit and incentive systems that were in place on the effective date of the Act—indeed, it is impossible to construct a hypothesis as to legislative purpose which would have made such a choice rational—yet if § 703(h) is not a "grandfather" clause as to them, would Congress have placed seniority systems in the same phrase if its intent was to accord such systems a distinctly different treatment?

(b) The decision below rests on an erroneous inference as to Congress' intent drawn from certain written materials introduced by Senator Clark during the debate on Title VII. Those materials state that Title VII would have no effect on "established" or "existing" seniority systems; from these statements, the court below inferred that Title VII *would* affect seniority systems that were *not* "established" or "existing" when the Act was passed. On its face that inference is unjustified. The assurance that Title VII would not overturn established seniority systems is not a declaration that the statute would overturn later established seniority systems. And when the Clark materials are read in the complete legislative context, including Senator Clark's own statement when he introduced those materials that "the bill would not affect seniority at all" (110 Cong. Rec. 7207), it becomes clear that the lower court's inference is not what Congress intended.

From the start of the legislative consideration of Title VII, those who sought its defeat repeated certain themes that they hoped would produce a groundswell of public opposition to the bill. Principal among these were the charges that the bill would require quotas (see *Weber*, 443 U.S. at 205-206; *id.* at 231-244 (Rehnquist, J., dissenting), and that it would destroy existing rights of seniority. The latter charge was voiced in the Minority Report accompanying the House Report,[9] in a speech by Senator Hill prior to the Senate's consideration of the bill,[10] and in speeches by Governor Wallace who was then a candidate in the Democratic presidential primaries.[11]

The court of appeals proceeded as if the supporters of the bill, to whom "we look . . . when the meaning of the

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[9] H.R. Rep. No. 914, 88th Cong., 1st Sess. 65, 71 (1963).

[10] 110 Cong. Rec. 486-489.

[11] These speeches were discussed, *inter alia*, at 110 Cong. Rec. 11471, 11486.

statutory words is in doubt" (*Schwegman Bros. v. Calvert Corp.*, 341 U.S. 384, 394-395), focused their assurances as to the limits of Title VII exclusively on existing seniority systems. The proponents did not do so; on the contrary, their assurances applied to "seniority systems" and did not distinguish pre-Act systems from post-Act systems.

The Pre-§ 703(h) Discussion.[12] The bill was considered first by the House. The Minority Report in the House had warned that the bill, if enacted, would have numerous calamitous consequences, among them that it would "destroy" seniority. H. Rep. No. 914, 88th Cong., 1st Sess. 65 (1963). When the bill reached the House floor, the opening speech in support of its passage was delivered by Representative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" which had been leveled at the bill (110 Cong. Rec. 1518). With respect to seniority, he stated:

> It has been asserted also that the bill would destroy worker seniority systems and employee rights vis-a-vis the union and the employer. This again is wrong. The bill would do no more than prevent a union, as it would prevent employers, from discriminating against or in favor of workers because of their race, religion, or national origin. [*Ibid.*].

During the course of the House debate, an amendment was proposed that would have made it unlawful to prefer one employee over another "for reasons which may have the indirect effect of causing discrimination because of race, color, religion or national origin." *Id.* at 2593. Representative Griffin explained why he could not support the amendment:

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[12] Throughout the deliberations in the House, and in the Senate until introduction of the Dirksen-Mansfield substitute late in the filibuster, there was no § 703(h) in the bill.

> The amendment of the gentleman from New Jersey refers to other practices which "may" have the "indirect effect" of discriminating on the basis of race, color, and so forth.
>
> I should like to say for the record and for the purpose of establishing legislative history, that if a union, or an employer, for that matter, engages in a practice which is a subterfuge amounting to discrimination on the basis of race, color, or creed in some indirect fashion then a court would probably find that such a practice would fall within the scope of this bill.
>
> However, so far as the gentleman's amendment is concerned, there are factors such as seniority, length of employment, and other factors which could affect union membership, union rights, and so forth, and have nothing to do with color, race, or creed.
>
> . . . I hesitate to support the amendment for the reasons I have indicated. [*Id.* at 2594].

The amendment was rejected (*id.* at 2595).

With no further reference to seniority, the bill was passed by the House, and sent to the Senate. Shortly thereafter, the Republican sponsors in the House prepared a memorandum describing the bill as passed by the House. In pertinent part, the memorandum stated:

> Title VII does not permit the ordering of racial quotas in businesses or unions and does not permit interferences with seniority rights of employees or union members [*id.* at 6566].

In the Senate, a 17-day debate ensued over whether the bill should be referred to Committee. During that period, Senator Humphrey, who was co-manager (with Senator Kuchel) of the entire Civil Rights bill, introduced a newspaper article quoting the answers of a Justice Department "expert" to the "ten most common objections to Title VII." In pertinent part it stated:

> Objection: The law would empower federal "inspectors" to require employers to hire by race. White people would be fired to make room for Negroes. Seniority rights would be destroyed. . . .
>
> Reply: The bill requires no such thing . . .
>
> . . . The bill would not authorize anyone to order hiring or firing to achieve racial or religious balance. An employer will remain wholly free to hire on the basis of his needs and of the job candidate's qualifications. What is prohibited is the refusal to hire someone because of his race or religion. Similarly, the law will have no effect on union seniority rights. [*Id.* at 5094].

On March 17, responding to a political advertisement charging that the bill would give the federal government the power to run America's businesses, Senator Humphrey, on the floor of the Senate, stated:

> Title VII . . . will prohibit discrimination in employment . . . It does not limit the employer's freedom to hire, fire, promote, or demote for any reason—or no reason—so long as his action is not based on race, color, religion, national origin, or sex. It does not interfere with job seniority . . . . [*Id.* at 5423].

The advertisement had listed "seniority in private employment" as one of the individual rights that would be lost were the bill passed (*ibid*). Senator Humphrey countered:

> [N]othing in the bill would affect any seniority plan which was not a cloak for racial or religious discrimination. [*Ibid*].

On March 26, 1964, the Senate voted to reject the motion to refer the bill to Committee (*Id.* at 6455), and on March 30, the formal debate on the bill began. Senators Humphrey and Kuchel, the co-managers, undertook "to lay the affirmative case for the bill before the Senate" (*Id.* at 6528). Each of them devoted a portion of his

speech to answering the charges respecting seniority. Senator Humphrey said:

> I hope this presentation will set to rest the doubts about this bill which have been voiced by many union members across the country. This bill is not an instrument to abolish seniority or unions themselves, as some have charged. The only standard which the bill establishes for unions and management alike is that race will not be used as a basis for discriminatory treatment. The full rights and privileges of union membership, as protected by other Federal laws and court decisions, will in no way be impaired. As a longstanding friend of the American worker, I would not support this fair and reasonable equal employment opportunity provision if it would have any harmful effect on unions. The truth is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about Title VII. [*Id.* at 6549].

Senator Kuchel, in the other major opening speech in support of the bill, made the same point:

> Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. . . . [T]he important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.
>
> Neither would seniority rights be affected by this Act. [*Id.* at 6553-54].

At the close of his speech, Senator Kuchel introduced the memorandum prepared by the Republican sponsors in the House, describing the bill as enacted by the House. *Id.* at 6665-66. (That memorandum, as noted earlier, stated that "Title VII . . . does not permit interferences with seniority rights of employees or union members," *id.* at 6566.)

Each of the next several days was devoted to the sponsors' exposition of a particular title of the bill. On April 8, 1964, the speeches in support of Title VII were made by Senators Clark and Case, the bipartisan "captains" for Title VII. Senator Clark noted the charge Senator Hill had earlier made that "Title VII would undermine the vested rights of seniority" (*Id.* at 7206), and he responded:

> [I]t is clear that the bill would not affect seniority at all. It would not affect the present operation of the National Labor Relations Act or rights under existing labor laws. [*Id.* at 7207; emphasis added].

As proof of this conclusion, Senator Clark inserted in the record certain documents which, ironically, constitute the entirety of the "legislative history" which the court below declared "conclusively demonstrates that Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of Title VII's effective date" (JA 143-144 and n. 5).

The first of these was a Justice Department memorandum, which stated in relevant part:

> First, it has been asserted that Title VII would undermine vested rights of seniority. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the

> least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as a basis for discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title [*id.* at 7207].

The second document introduced by Senator Clark was an interpretative memorandum which he and Senator Case had had prepared (*id.* at 7212). In pertinent part, that memorandum stated:

> [Section 703] prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section [703] are those which are based on any of the five forbidden criteria, race, color, religion, sex, and

national origin. Any other criterion or qualification for employment is not affected by this title.

* * * *

Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.) [*Id.* at 7213].

Finally, Senator Clark introduced written answers to certain questions that had been posed by Senator Dirksen (*id.* at 7215-16):

Question: Would the same situation prevail in respect of promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?

Answer: Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can

still be "first fired" so long as it is done because of his status as "last hired" and not because of his race.

Question: If an employer is directed to abolish his employment list because of discrimination, what happens to seniority?

Answer: The bill is not retroactive, and it will not require an employer to change existing seniority lists. [*Id.* at 7217].

After the speeches in support of the bill were completed, the filibuster began. From that time forward, there were only occasional statements by sponsors as to the meaning of the bill.

On April 25, Senator Keating took the floor during the "morning hour" to respond to a pamphlet published by the Coordinating Committee for Fundamental American Freedoms, charging that the bill would require quotas and would "interfere with the seniority rights of employees and union members":

> "The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups. The coordinating committee also maintains that Title VII will authorize the Federal Government to interfere with the seniority rights of employees and union members.
>
> "Title VII does not grant this authority to the Federal Government. To make such assertions, as the coordinating committee does, is not only an unfortunate misinterpretation of the title's operation but is a cruel hoax because it generates unwarranted fear among those individuals who must rely upon their job or union membership to maintain their existence. [*Id.* at 9111].

On May 8, Senator Carlson introduced an analysis he had had prepared because of "the gravity of the charges against the bill." In pertinent part, the analysis stated:

> There would be no authority to require quota hiring to achieve racial balance or to order firing of whites to create jobs for Negroes. Union seniority would not be affected and employers would remain wholly free to hire or fire on the basis of job qualifications. [*Id.* at 10520].

On May 20, Senator Javits took the floor to respond to charges contained in a campaign speech by Governor Wallace:

> Another thing that people were put in fear about was seniority and trade unions. Governor Wallace said that union seniority systems would be abrogated and that white men's jobs would be taken and turned over to Negroes. That is untrue. The only thing that the bill will do—and the administration of existing state laws has confirmed it—is deal with outright cases of discrimination. [*Id.* at 11471].

Senator Humphrey, too, was upset by the "distortion" which had occurred during the Maryland primary campaign (*id.* at 11485). Governor Wallace had "completely misrepresented the bill" (*id.* at 11486). Senator Humphrey undertook a point-by-point refutation; in pertinent part:

> Then the Governor said that the bill would—"tell employers whom they can 'hire and fire' and 'destroy the seniority systems of labor unions.'"
>
> The authors of the bill in the House—those who were the architects of the bill and those in the labor movement itself—have said that that statement is totally untrue. It just is not so. [*Ibid.*].

That same day, Senator Humphrey introduced a newsletter "stating some of my observations on the Civil Rights bill, as to what it provides and what it does not provide" (*id.* at 11486). In part, the newsletter stated:

> The bill does not permit the Federal Government to require an employer or union to hire or accept for membership a quota of employees from any particular minority group.

> The bill does not permit the Federal Government to destroy the job seniority rights of either union or nonunion employees. [*Id.* at 11486].

On May 22, Senator McGovern made a speech designed to demonstrate that "[t]he horrendous powers claimed for [the bill] by its opponents simply do not exist" (*id.* at 11768). In pertinent part:

> The bill does not create any hiring quotas. The bill does not affect union seniority. [*Ibid.*].

On May 25, Senator Humphrey introduced an explanation of the House bill prepared by his staff, which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress" (*id.* at 11847). In pertinent part, the explanation stated:

> The Title contains no provisions which would jeopardize union seniority systems, nor would anything in the Title permit the government to control the internal affairs of employers or unions. [*Id.* at 11848].

The Post-§ 703(h) Discussion. On May 26, the Dirksen-Mansfield substitute was introduced, which added several provisions to the bill, including § 703(h). On June 4, Senator Humphrey made the major presentation explaining the purpose of the new provisions. Section 703(h), he explained,

> makes clear that it is only discrimination on account of race, color, religion, sex or national origin, that is forbidden by the title. The change does not narrow application of the title, but merely clarifies its present intent and effect. [*Id.* at 12723].

On June 18, Senator Williams of Delaware introduced a letter he had received from Senator Dirksen answering certain questions he (Senator Williams) had asked about the bill. "Since [Senator Dirksen] was the author of several of the amendments approved by the Senate I felt it was important that his interpretation of their legisla-

tive intent be incorporated in the RECORD." (*Id.* at 14329). In pertinent part, the letter from Senator Dirksen, dated June 18, 1964 (the day preceding the Senate's final vote) read as follows:

> DEAR JOHN: I have your letter of June 17 raising questions which have been brought to your attention . . . Let me set out your questions and then follow them with my views so that you will have a complete record in this letter.
>
> • • • •
>
> 10. That seniority in unions, civil service, and company employment would be jeopardized.
>
> The Senate substitute bill expressly protects valid seniority systems. [*Id.* at 14329].

Senator Williams then provided his own analysis of the improvements made by the Senate in the House bill (*id.* at 14329). In pertinent part:

> The language in the House bill placed seniority, merit, and incentive systems in jeopardy.
>
> • • • •
>
> Senate amendments permit and protect seniority, merit, and all incentive systems. [*Id.* at 14331].

On June 19, 1964, the filibuster having been broken by a vote of cloture (*id.* at 13327), the Senate adopted the Dirksen-Mansfield substitute (*id.* at 14511). As the Senate had substantially revised the House bill, the House debated a recommendation that it concur in the Senate amendments. In the course of that debate, Representative McCulloch, who had been the principal Republican sponsor in the House, stated:

> Much inaccurate information has been circulated about the legislation both as it left the House and as

> it is now before the House. In view thereof, I wish to negate only the worst glaring inaccuracies that have had such wide dissemination.
>
> • • • •
>
> Fifth. The bill does not permit the Federal Government to destroy the job seniority rights of either union or non-union employees. [*Id.* at 15893].

A few minutes later, the House voted to concur in the Senate's amendments, thus enacting the Civil Rights Act of 1964 (*id.* at 15897).

That same day, Senator Humphrey, marking the final passage of the bill, introduced an updated version of his May 25 memorandum, describing the bill as enacted (*id.* at 15865). The memorandum stated, *inter alia*, that Title VII "contains no provisions which jeopardize union seniority systems" (*id.* at 15866).

The Lessons of the Legislative History. The gist of the Congressional discussion of seniority is as follows.

First, in the House, the proponents' statements were uniformly to the effect that "Title VII . . . does not permit interferences with seniority rights of employees or union members." See *supra* pp. 14-15.

Second, in the Senate, from the opening of the debate on Title VII to the introduction of the Dirksen-Mansfield substitute, the following proponents spoke to the status of seniority—Senators Humphrey, Kuchel, Clark, Keating, Carlson, Javits and McGovern. All of the statements by the proponents spoke of "seniority" and not of "existing seniority," and those statements were uniform in their content: "Title VII . . . does not interfere with job seniority." "Neither would seniority rights be affected by this Act." "[I]t is clear that the bill would not affect seniority at all." "Title VII does not grant the authority to the Federal Government . . . to interfere with the seniority rights of employees and union members." "Union seniority would not be affected." See *supra* pp. 15-23.

In addition, Senator Clark introduced the written memoranda on which the court below placed its entire reliance. While those memoranda phrased the asserted objection to Title VII and the response in terms of the bill's effect on "vested," "existing" or "established" seniority rights, that is because they were responding to a charge made by the bill's opponents, and were providing an assurance tailored to the charge: the claim that the bill would affect existing seniority rights was false; the bill would *not* affect existing seniority rights. There is no suggestion in those memoranda that the bill while protecting *pre*-Act *bona fide* seniority systems would invalidate *post*-Act *bona fide* seniority systems. Not only did Senator Clark in introducing the memoranda state "it is clear that the bill would not affect seniority at all," at the same time he also introduced written responses to questions posed by Senator Dirksen, and one of those answers stated:

> Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" so long as it is done because of his status as "last hired" and not because of his race.

See *supra* pp. 18-21.

Third, the few post-§ 703(h) references to seniority all are to the effect that "The Senate substitute bill expressly protects valid seniority systems." See *supra*, pp. 23-24.

Finally, it should be noted that prior to the adoption of § 703(h), Title VII did not separately address seniority. Thus, the pre-§ 703(h) assurances that Title VII "would not affect seniority at all" could not have been based on the concept that established seniority systems were especially protected, and must have reflected the understanding succinctly stated in the Justice Department memorandum:

> If . . . a collective bargaining contract provides that in the event of layoffs, those who were hired last

> must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. . . . Any difference in treatment based on established seniority rights would not be based on race and would not be forbidden by the title. [See *supra*, pp. 18-19].

In other words, those assurances evince an understanding that even where there has been pre-Act discrimination against blacks in hiring or placement, application thereafter of neutral seniority rules does not constitute discrimination on the basis of race within the meaning of what is now §§ 703(a) and (c). As Senator Humphrey explained, the addition of § 703(h) "does not narrow application of the Title, but merely clarifies its present [pre-Dirksen-Mansfield substitute] intent and effect."

The totality of evidence, including the Clark memoranda, thus does not support the far-reaching limitation on § 703(h) found by the court below.

3. The Statutory Scheme.

This Court has deemed significant in construing Title VII both the overall purpose of that statute and its inevitable intersection with the national labor policy. *Emporium-Capwell Co. v. Community Org.*, 420 U.S. 50, 69-70; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418; *Trans World Airlines v. Hardison*, 432 U.S. 63, 79; *Steelworkers v. Weber*, 443 U.S. 193, 201-204; *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608. A construction of § 703(h) that limited its application to seniority systems in place on July 2, 1965, would do violence both to the overall purposes of Title VII and to the national labor policy.

(a) *The purposes of Title VII.* Title VII was intended as a "spur or catalyst" to broadening employment opportunities for minorities. *Albemarle, supra,* 422 U.S. at 418; *Weber, supra,* 443 U.S. at 204. That objective is not confined to the minimum steps Title VII *requires* employers and unions to take to bring their practices into conformity with the statute.

> The Court has . . . held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. [*Franks, supra,* 424 U.S. at 778-779. See also *Weber, supra,* 443 U.S. at 201-204.]

It is most unlikely that Congress intended to deter such ameliorative steps by immunizing seniority systems as they existed on July 2, 1965 but withdrawing that immunity if the parties thereafter broadened their seniority systems in a manner beneficial to minorities. Yet, as the dissent below emphasized (and the majority below implicitly acknowledged), that is precisely the effect of construing § 703(h) as merely a "grandfather" clause. If a seniority system in effect on July 2, 1965 provided for job seniority, a conversion thereafter to departmental seniority (which would broaden mobility, and thus benefit pre-Act discriminatees) would, under the decision below, remove the protection of § 703(h) and subject the employer and union to Title VII liability because, by not providing even *broader* mobility (i.e. plant or company seniority), the changed system would be deemed to perpetuate the effects of pre-Act discrimination.[13] Similarly, any change in lines of progression, even if it reduced the

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[13] See, e.g., *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 658-659 (2nd Cir. 1971); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 223-224 (5th Cir. 1974).

"steps" necessary to reach the most desirable jobs, would, under the decision below, remove the protection of § 703(h) from the LOPs altogether, and subject them to invalidation except to the extent justified by "business necessity." [14] The decision below thus would make Title VII a deterrent to step by step progress. It would tend to freeze pre-1965 seniority patterns into perpetual place.

(b) *The relation of Title VII to the national labor policy.* As this Court has recognized, Title VII in general (*Emporium-Capwell, supra*) and § 703(h) in particular, must be construed with the knowledge that Congress did not intend to intrude unnecessarily upon core principles of national labor policy.

> Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree . . . that an agreed-upon seniority system must give way . . . [*TWA v. Hardison, supra*, 432 U.S. at 79].

And, as the Court elaborated in *California Brewers, supra*, 444 U.S. at 606:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers v. Weber*, 443 U.S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co.*

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[14] See, e.g., *Stevenson v. International Paper Co.*, 516 F.2d 103, 114-115 (5th Cir. 1975); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1355 (8th Cir. 1975), *vacated on other grounds*, 423 U.S. 809.

> *v. NLRB*, 397 U.S. 99. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. See *Ford Motor Co. v. Huffman*, 345 U.S. 330; *Aeronautical Lodge v. Campbell*, 337 U.S. 521. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703(h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U.S., at 355, n. 41.
>
> . . . Significant freedom must be afforded employers and unions to create differing seniority systems.[15]

In the natural course of events both "the give and take of free collective bargaining" and "the specific characteristics of a particular business or industry" will force changes in a seniority system over time. Unions often seek broad seniority principles in order to maximize the role length of service plays in determining job opportunities, while employers customarily seek narrower applications of seniority to maximize the retention of employees on jobs with which they are familiar and on which they have developed experience and skills. U.S. Dept. of Labor, Bulletin 908-11, *Collective Bargaining Provisions-Seniority* (1949), p. 14. Shifts in relative bargaining power, or in the importance the parties place on this

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[15] The Court added: "But that freedom must not be allowed to sweep within the ambit of § 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system," *id.* at 608. The decision below was not responding to that *caveat*. The court below assumed that the system at issue here would have been protected by § 703(h) had it been adopted prior to July 2, 1965, i.e. that it did *not* "depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system." The vice of the system here, according to the court below, was its timing, not its content.

issue compared to others, are likely to alter the system. Another significant catalyst to change in seniority systems is change in the "specific characteristics" of the employer. Congress was acutely aware in enacting Title VII that automation was radically altering the workplace in America. *Weber*, 443 U.S. at 202. Automation calls for changes in established seniority systems to adapt the system to differences in job requirements and to altered relationships between jobs, and to protect employees whose jobs are eliminated as others are created. To take a simple example, whenever a new job is created, the union and employer must change some LOP by inserting that job into the LOP.

The genius of collective bargaining, and a substantial reason for "encouraging [this] practice and procedure" (§ 1 of the NLRA), is that the bergaining process provides a salutary means for adapting the rules of the shop to changes in the needs and desires of the parties and to the demands of a dynamic economy and an onrushing technology. Indeed, the failure of a business or industry and the workers involved to accommodate their methods of doing business to new circumstances is likely to cost all concerned their livelihood. We do not believe that Congress can fairly be charged with an intent to impose stiff penalties on legitimate changes in seniority rules, and thus to deter employers and unions from making such natural changes. Yet that is what the lower court's reading of Title VII does.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1981

THE AMERICAN TOBACCO COMPANY, *et al.*,
Petitioners,

v.

JOHN PATTERSON, *et al.*

AMERICAN BRANDS, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a seniority system instituted by an employer and union after the effective date of Title VII is protected by § 703(h) where the system perpetuates the employer's and the union's own prior intentional discrimination.

2. Whether a requirement of prior service in a line of progression, imposed as a prerequisite for eligibility to bid on higher-rated jobs in the line, is part of a "seniority system" within the meaning of § 703(h) where satisfaction of the requirement is not determined by any measure of time served in employment.

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No. 80-1199

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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THE AMERICAN TOBACCO COMPANY, et al.,

Petitioners,

v.

JOHN PATTERSON, et al.

==========

AMERICAN BRANDS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

==========

On Writ Of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

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BRIEF FOR RESPONDENTS JOHN PATTERSON, ET AL.

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STATEMENT OF THE CASE

These consolidated employment discrimination cases concern the application of

§ 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), to seniority systems or lines of progression instituted after the effective date of the Act.

A. Proceedings Below

This litigation began in 1969, when John Patterson and other black employees filed administrative charges alleging discrimination by the company[1/] and the union[2/] at three American Tobacco Company

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1/ In this brief, "company" refers collectively to the American Tobacco Company, a Division of American Brands, Inc., and to American Brands, Inc.

2/ In this brief, "union" refers collectively to the Tobacco Workers International Union and Local 182, Tobacco Workers International Union. The brief for the union petitioners states that, in 1978, the Tobacco Workers International Union merged with the Bakery and Confectionary Workers International Union to form the present

facilities in Richmond, Virginia. (App. 6).[3/] In 1973, the employees filed a class action in the district court, charging the company and the union with racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. (App. 2-3). This action was consolidated for trial with a subsequent Title VII action, filed by the Equal Employment Opportunity Commission, alleging both race and sex discrimination.

2/ cont'd.

Bakery, Confectionary and Tobacco Workers International Union. Brief at 1 n.1.

3/ In this brief, "App." refers to the joint appendix filed in this Court; "J.A." refers to the joint appendix filed in the court of appeals; "Ex. App." refers to the joint exhibit appendix filed in the court of appeals; "Tr." refers to the trial transcript; and "Pl. Ex." refers to plaintiffs' trial exhibits.

(App. 3).

Following the trial in 1974, the district court found that the company and the union engaged in intentional race and sex discrimination until 1968; that thereafter they continued to discriminate against black and female employees in seniority, promotions, and job classifications; and that the company also discriminated against blacks and women in the selection of supervisors. (App. 7-11). The Fourth Circuit affirmed these findings in 1976 (App. 75-78, 93-94, 96-97),[4/] and this Court denied certiorari. (App. 108).

4/ The Fourth Circuit also affirmed, with some modifications, the relief ordered by the district court (App. 78-92, 94, 97-104), but held that the EEOC's complaint against the union for sex discrimination should be dismissed due to the EEOC's failure to attempt conciliation before filing suit. (App. 94-96).

On remand, the company and the union filed a motion to vacate the district court's 1974 orders and to dismiss the complaints on the basis of this Court's 1977 decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324.[5/] On appeal from the district court's denial of this motion, a majority of the Fourth Circuit panel held in 1978 that the case should be remanded for further findings on whether the seniority system was protected from Title VII liability by § 703(h) as interpreted in Teamsters.

5/ The motion also sought dismissal of the complaints on the basis of United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), and Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). The Fourth Circuit en banc affirmed the district court's denial of the motion on the Evans issue and remanded the Hazelwood issue for further consideration. (App. 146-53). No petition for certiorari was filed with respect to these issues.

(App. 117-18). The panel majority excluded from the scope of this remand all non-seniority aspects of the challenged promotional practices, including the use of lines of progression. The panel held that § 703(h) could not immunize these lines of progression from liability because they were not part of a "seniority system" within the meaning of the statute. (App. 116).

On rehearing en banc, the majority agreed with the panel that Teamsters required a remand for additional proof and a new determination on the bona fides of the seniority system. (App. 145-46).[6/] However, the en banc majority did not reach the question whether the lines of progres-

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6/ No petition for certiorari was filed with respect to this issue.

sion were part of a "seniority system." Instead, the en banc court focused on the fact that the lines of progression were instituted in 1968 and held that, even if the lines were considered part of a seniority system, § 703(h) did not apply because the system was established after the effective date of Title VII. (App. 142-45).[7/] The question now before the Court therefore concerns the application of § 703(h) to seniority systems or lines of progression which were instituted after July 2, 1965, and which perpetuate prior intentional discrimination.

7/ This issue was not briefed or argued by any party in the district court or before either the panel or the en banc court of appeals.

B. Discriminatory Practices

1. Before 1963: Rigid Segregation

These cases involve employment practices at three interrelated American Tobacco Company facilities in Richmond, Virginia: the "Virginia branch," which manufactures cigarettes; the "Richmond branch," which manufactures pipe tobacco; and the "Richmond office," which maintains accounts and records for both branches. (App. 16-17, 75).[8/] The Virginia branch and the Richmond branch are each divided into two production departments, largely

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8/ The district court held that the company discriminated on the basis of race and sex in filling supervisory positions in the Richmond office (App. 8-9), and the Fourth Circuit affirmed this ruling. (App. 96-97). The company did not challenge this ruling in its second appeal (see App. 125) or in the present petition for certiorari.

along racial lines: the predominantly black prefabrication departments blend and prepare tobacco for further processing, and the predominantly white fabrication departments manufacture the finished products. (App. 18, 34, 75).[9/] The Tobacco Workers Union is the bargaining agent for non-craft hourly production and maintenance employees in both departments of both branches. (App. 17).[10/]

Until 1963, the company and the union maintained an overt policy of job and

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9/ The branches are also racially identifiable. The Richmond branch has a substantially larger percentage of black employees and lower wage rates than the Virginia branch. (App. 34-35).

10/ Other employees are represented by local unions affiliated with the International Brotherhood of Electrical Workers and the International Association of Machinists and Aerospace Workers. (App. 17). Those unions are not parties to this lawsuit.

departmental segregation on the basis of race. As the Fourth Circuit stated:

> Before 1963 the union and the company overtly segregated employees by race with respect to job assignments, cafeterias, restrooms, lockers, and plant entrances. White employees were represented by Local 182 of the Tobacco Workers International Union, while black employees were represented by Local 216.

(App. 75). Blacks were assigned to the lower paying prefabrication departments, while jobs in fabrication were largely reserved for whites.[11/] Promotions were made on the basis of departmental seniority, and employees could not transfer from one

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11/ White employees held a small number of the best paid jobs in the prefabrication departments (App. 34), while black employees held some low paid manual labor and cleaning jobs in the fabrication departments. (Ex. App. 46-48). Until 1963, there was a separate miscellaneous department at the Virginia branch containing two job classifications held only by blacks: cleaner and elevator operator. (App. 33).

department to another without forfeiting seniority. (App. 75). Job classifications were segregated by sex as well as race. (App. 43-46). The company appointed only white males to supervisory posts. (App. 96).

2. 1963-1968: Continuing Intentional Discrimination

In 1963, under government pressure,[12/] the segregated locals were merged and the departmental seniority system was replaced with a branch seniority system. (App. 75). However, as the district court

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12/ The president of Local 182 testified that "we were informed by the Defense Supply Agency that if we continued to maintain segregated local unions, then the Defense Supply Agency may have to step in and say we will cancel all government contracts with the American Tobacco Company, which if this would have happened would have meant detrimental loss to our membership." (J.A. 202).

and the court of appeals held, intentional discrimination continued. Although the departmental seniority system was no longer in effect at the Virginia branch, blacks were now denied access to better jobs on the basis of unwritten, subjective selection procedures administered by white supervisors. (App. 75-76).[13/] Despite the change in the form of the seniority system, employees with the greatest branch seniority were not promoted to automatic machinery jobs in the fabrication department unless the supervisors determined they were "qualified." (App. 28, 76). Supervisors canvassed employees to determine their interest in potential vacancies.

13/ There were 71 supervisory employees at the Virginia branch in 1969. The number of black supervisors increased from only one in 1963 to only three in 1969. (App. 34).

(App. 28). An employee was deemed "qualified" if he or she "had filled a particular job before and was, in the opinion of supervisory personnel, familiar with it." (App. 28). Since all but a token number of blacks had not been permitted to hold these jobs on either a permanent or a temporary basis[14/] up to that time, very few black employees were deemed "qualified" for these promotions under the procedures instituted in 1963. (Tr. 108-13). Not surprisingly, there was an increase of only four black employees in the fabrication department of

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14/ Prior to 1963, black employees were not permitted to fill temporary vacancies in job classifications restricted to whites. (App. 33). Since 1963, employees in the predominantly black prefabrication departments have generally filled temporary vacancies in those departments, and employees in the predominantly white fabrication departments have generally filled temporary vacancies in those departments. (App. 28).

the Virginia branch between 1963 and 1968. (App. 76).[15/]

At the Richmond branch, the white supervisors[16/] canvassed employees to determine their "interest" in each vacancy. A supervisor then selected the most senior employee deemed by the supervisor to be willing to fill the vacancy. Vacancies were not posted, and there were no written job descriptions. (App. 76). Despite the

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15/ In 1963, 11.8 percent of the employees at the Virginia branch (196 of 1,653 employees) were black. (App. 34). The number of blacks in the fabrication department increased only from 82 in 1963 to 86 in 1968. (Ex. App. 46-47). In both 1963 and 1968, the great majority of black employees in the fabrication department were assigned to manual labor, cleaning, and other non-machine operator jobs. (Ex. App. 46-47).

16/ There were 31 supervisory employees at the Richmond branch in 1973. The first black supervisor was appointed in 1966; the second was not appointed until 1971. (App. 35).

formal change in 1963 from departmental to branch seniority, there was an increase of only six black employees in the fabrication department of the Richmond branch between 1963 and 1968.[17/] Throughout this period, the company also discriminated against female employees at both branches. (App. 93-94).

The continuing discrimination against black and female employees was intentional. The courts below held that, while there was no discrimination in hiring after 1965, it was not until 1968 that the company and

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17/ In 1967, 32.1 percent of the employees at the Richmond branch (79 of 246 employees) were black. (App. 35). The number of blacks in the fabrication department increased only from 6 in 1963 to 12 in 1968. (Ex. App. 48). In both 1963 and 1968, most of the black employees in the fabrication department were assigned to general labor and other non-machine operator jobs. (Ex. App. 48).

the union instituted promotional policies which were fair even in form. (App. 7, 75-76, 114).

3. 1968 and After: The Lines of Progression

On January 15, 1968, the company instituted a posting and bidding system for filling vacancies in the Tobacco Workers bargaining unit. Under this system, vacancies were posted on plant bulletin boards for employee bids. The job was awarded to the bidder with the most branch seniority in the branch containing the vacancy. (App. 21-23). The district court found that this system was fair but that it needed further implementation through the posting of written job descriptions, and the Fourth Circuit affirmed this finding. (App. 8-9, 76-78).

The district court also found that after January 1968 the company and the union engaged in two other discriminatory practices: (1) continuation of the previous practice of maintaining a separate seniority roster for each branch and conditioning inter-branch transfers upon forfeiture of accrued seniority; and (2) institution of lines of progression which perpetuated the effects of the prior intentional discrimination and segregation. (App. 7, 31-32, 76-77). The Fourth Circuit en banc has remanded this case to the district court for further findings concerning the first practice. (App. 145-46). Only the second practice is before this Court.

The lines of progression which are at issue here[18/] were not included in the Jan-

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18/ The nine lines of progression are as follows: (1) packing or making machine

uary 1968 collective bargaining agreement. (See Pl. Ex. 35FF-4). Rather, these lines were established by the company in November 1968 (J.A. 570), and were ratified by the union in 1969. (J.A. 245-47).[19] Two-thirds

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18/ cont'd.

operator or Schmermund boxer operator to learner adjuster; (2) catcher to examiner-making; (3) line searcher-Schmermund boxer to examiner-packing; (4) boiler operator to turbine operator; (5) learner adjuster to adjuster; (6) making or packing adjuster to overhaul adjuster; (7) adjuster helper-prefabrication to adjuster-prefabrication; (8) assistant adt dryer operator to adt dryer operator; (9) assistant textile dryer operator to textile dryer operator. (App. 21-22). The courts below held that the lines leading to adjuster, overhaul adjuster, and adjuster-prefabrication are justified by business necessity and therefore are lawful despite their discriminatory effect on blacks and women. (App. 31-32, 79).

19/ Both the company and the union stipulated in their joint petition for certiorari that, "[s]olely for purposes of this petition, petitioners treat the lines of progression as having come into exis-

of all hourly paid non-craft employees at the two branches hold jobs in the lines of progression.[20/] Each line is composed of

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19/ cont'd.

tence after Title VII's effective date." Pet. at 5 n.5. The majority opinion of the en banc court below stated that the line-of-progression policy was adopted in January 1968. (App. 143). The dissenting opinion questioned whether the record was complete on this factual issue but acknowledged that "the majority holding as to the effect of § 703(h) on the lines of progression within the seniority system is based entirely on the fact that the lines did not exist in 1965." (App. 177). The dissenting judges would have remanded the case for factual findings on the origins of the lines of progression. (App. 161-62).

20/ Each line of progression involves only two or three job classifications. See Company Brief at 4 n.7. However, out of a combined total of 952 hourly paid non-craft employees at the Virginia and Richmond branches, approximately 646 hold jobs in the relatively small number of classifications included in the lines of progression. These 646 employees hold the vast majority of the highest paid jobs at both branches. (Ex. App. 158-62).

traditionally segregated jobs: there are seven white lines of progression[21] and two black lines of progression.[22] The jobs in the white lines pay substantially more than the jobs in the black lines.[23]

21/ The lines leading to learner adjuster, examiner-making, examiner-packing, turbine operator, adjuster, overhaul adjuster, and adjuster-prefabrication are composed of jobs held almost exclusively by whites. In 1968, only one black employee held a top job in any of these lines. (Ex. App. 46-48). By 1973, there was still only one black employee in a top job, but there were 120 white employees in top jobs in these lines of progression. A total of approximately 641 employees held all jobs in these lines in 1973. (Ex. App. 158-62).

22/ The jobs of assistant adt dryer operator, adt dryer operator, assistant textile dryer operator, and textile dryer operator have never been held by white employees. (Ex. App. 171-74). In 1973, a total of five black employees at the Virginia branch held all the jobs in these two lines of progression. (Ex. App. 158-62).

23/ The top jobs in the white lines are among the highest paid hourly production jobs at both branches. The jobs in the black lines pay substantially less. (Ex. App. 155-62).

The great majority of the jobs included in the lines of progression are held by white employees at the top of the wage scale in the fabrication department of the Virginia branch. (App. 78-79).[24/]

When a vacancy occurs in one of the top jobs in a line of progression, only employees who have held a lower job in that line are eligible to bid on the vacancy. (App. 21-22). Among the eligible bidders, promotion is not determined by either seniority in the lower job or seniority in the line of progression; rather, branch seniority controls.[25/] The requirement

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24/ As late as 1973, line-of-progression jobs were held by approximately 585 whites and only 61 blacks. Approximately 619 of these jobs were at the Virginia branch, while only 27 of the jobs were at the Richmond branch. (Ex. App. 158-62).

25/ The company and the union have repeatedly acknowledged that branch seniority is used for advancement within the lines of

of prior service in a job within a line of progression thus operates as a pre-

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25/ cont'd.

progression. For example, in briefs filed in the court of appeals, the company described the operation of the lines of progression in the following terms: "In these lines of progression, only those employees in the job classification immediately below the vacancy may bid. The employee with the greatest plant-wide [i.e., branch] seniority receives the promotion." Joint Brief of American Tobacco Co. and American Brands, Inc., Nos.75-1259/1263, at 13. See also id. at 10; Joint Reply Brief of American Tobacco Co.and American Brands, Inc., Nos. 75-1259/1263, at 18 ("employees move through the lines of progression based on plant-wide seniority, not date of entry into the line of progression"); Joint Petition for Rehearing of American Tobacco Co. and American Brands, Inc., Nos. 75-1259/1263, at 10 ("plant-wide seniority is used both to obtain an entry level job in any line of progression and to progress up each line"); Joint Brief of American Tobacco Co., American Brands, Inc., Tobacco Workers International Union, and Local 182, TWIU, Nos. 78-1083/1084, at 7 ("[w]ithin the line, only those employees in the job classification immediately below a vacancy could bid, although plant-wide seniority

requisite for the application of the seniority system. Among the limited number of employees who satisfy this prerequisite and are therefore eligible to bid on a vacancy, branch seniority is applied to determine the successful bidder.

The lines of progression, superimposed on the rigidly segregated employment pattern of the past, denied black and female

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25/ cont'd.

and not seniority within the line controlled"). However, the company and the union have also made the contradictory assertion that, for promotion to a permanent vacancy above the entry level within most lines of progression, job seniority in the immediately preceding job is controlling. Joint Reply of American Tobacco Co., American Brands, Inc., Tobacco Workers International Union, and Local 182, TWIU, to Plaintiffs' Responses to Petition for Rehearing, Nos. 78-1083/1084, at 4-5. While finding "considerable support" for the position that branch seniority is used for advancement within the lines of progression, the en banc majority below concluded that the record is ambiguous on this question. (App. 142-43 n.3).

employees the opportunity to advance to traditionally white male jobs. The intentionally discriminatory policy of promotions based on subjective supervisory determinations of "interest" and "qualifications," which had replaced overt job and departmental segregation in 1963, was in turn replaced in 1968 by the lines of progression. Blacks who were previously excluded from white jobs on the basis of race now were told that, because they had not held these jobs in the past, they would not be permitted to move up to higher paying white jobs in the new lines of progression. (App. 78-79). Women were similarly denied equal access to male jobs. (App. 93). The district court accordingly found that the lines of progression perpetuated past discrimination on the basis of race and sex. (App. 31-32). While three of the

lines were justified by business necessity and therefore were upheld despite their perpetuation of past discrimination,[26] the remaining lines were not supported by any adequate business justification and were unlawful. (App. 31-32). As the Fourth Circuit stated in affirming these findings:

> Most of these jobs [in the lines of progression] were in the fabrication departments. Since black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority. In this respect, the lines of progression perpetuated the effects of past discrimination in a manner similar to the formerly segregated departmental seniority rosters. On the basis of its

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26/ The court held that the lines leading to adjuster, overhaul adjuster, and adjuster-prefabrication were justified by business necessity. (App. 31-32). In 1973, the top jobs in these lines were held by 80 employees, all of whom were white. (Ex. App. 158-62).

> evaluation of conflicting expert testimony, the district court held that only three of the nine lines are justified by business necessity. For the others, alternative means such as on-the-job training are available to provide competent workers.

(App. 78-79) (footnote omitted).

The record provides ample support for these findings. By 1973 -- five years after the lines of progression were instituted -- rigid segregation of job classifications continued to characterize both branches. (App. 78). Whites still held all but one of 121 jobs at the top of the seven white lines of progression; the lone exception was a single black learner adjuster. (Ex. App. 158-62). White employees also continued to dominate the lower jobs in these lines: whites held approximately 465 of these jobs, while blacks held only 55. (Ex. App. 158-62). Moreover, of

approximately 200 hourly paid non-craft job classifications at the Virginia branch, 18 had never been held by whites and 10 had never been held by blacks. Of approximately 43 such classifications at the Richmond branch, 21 had never been held by whites and nine had never been held by blacks. (App. 78). Finally, the prefabrication department at the Virginia branch remained more than 80 percent black, while the fabrication department was still 86 percent white. The prefabrication department at the Richmond branch remained 92 percent black, while the fabrication department was 62 percent white. (App. 77). It is therefore clear from the record that the lines of progression and other post-1968 practices perpetuated the overt segregation and intentional discrimination of the past.

SUMMARY OF THE ARGUMENT

The historical evidence establishes a longstanding pattern of segregation and discrimination against black workers in the tobacco industry. In keeping with the racial policies of the industry, both the company and the union in this case were operated on a strictly segregated basis until 1963. The system of overt job and departmental segregation was then replaced by a system of intentional discrimination in promotions. Under the guise of evaluating "interest" in vacancies and "qualifications" for promotions, white supervisors restricted black employees to historically black jobs. This intentionally discriminatory promotional system continued until 1968, three years after the effective date of Title VII, when it was replaced by a

system based on lines of progression. The line-of-progression system, superimposed on the pre-existing pattern of rigid segregation and intentional discrimination, has perpetuated the racially exclusionary policies of the past by continuing to deny black workers access to historically white jobs at the top of the pay scale.

The legislative history of Title VII and the prior decisions of this Court establish that § 703(h) was not intended to protect such post-Act systems. Rather, § 703(h) provides a narrow exemption which was specifically designed to protect bona fide seniority systems which were in existence before the effective date of Title VII. Where, as here, an employer and a union have instituted a system after the effective date of Title VII which perpetuates their own prior intentional discrim-

ination, the system is prohibited. This interpretation of Title VII and § 703(h) accords with the fundamental purpose and underlying policies of the Civil Rights Act of 1964.

In addition, the lines of progression are not part of a "seniority system" within the meaning of § 703(h). Instead, the requirement of prior service in a line of progression operates as a prerequisite for eligibility to bid on higher-rated jobs in the line. Satisfaction of this prerequisite is not determined by seniority in any job, or by seniority in the line of progression, or by any other measure of time served in employment. Rather, the mere fact of service in a line-of-progression job determines eligibility for advancement. Among the limited group of employees who satisfy this non-seniority eligibility re-

quirement, branch seniority is applied to determine the successful bidder. Since the line-of-progression requirement is not part of a "seniority system," it is not protected by § 703(h).

ARGUMENT

I. SECTION 703(h) OF TITLE VII DOES NOT AUTHORIZE THE POST-ACT ADOPTION OF SENIORITY SYSTEMS WHICH PERPETUATE INTENTIONAL DISCRIMINATION AND SEGREGATION.

A. Section 703(h) Should Be Read in the Context of the Relevant Legislative Materials, the Prior Decisions of this Court, and the History and Purpose of Title VII.

Section 703(h) of Title VII provides in pertinent part as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to

> apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, ... provided that such differences are not the result of an intention to discriminate because of race ....

42 U.S.C. § 2000e-2(h).

Petitioners argue that the "plain language" of the statute applies to post-Act as well as pre-Act seniority systems.[27/] This Court, however, has rejected the simplistic notion that statutory language can have a fixed meaning apart from the context in which it is used. "It is a 'familiar rule, that a thing may be within the letter

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27/ Respondents submit that the lines of progression instituted in 1968 are not a "seniority system" or part of a "seniority system" within the meaning of § 703(h). See Argument II, infra. For the purposes of the present discussion, however, respondents will refer to the lines of progression as a "seniority system."

of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979), quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). See also Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944), aff'd sub nom. Gemsco Inc. v. Walling, 324 U.S. 244 (1945).

Thus, "'[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."'" Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 10 (1976), quoting United States v. American Trucking Associations, 310 U.S. 534, 543-44 (1940). See Murphy,

Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975); Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947). As Justice Frankfurter stated in analyzing a provision of the National Labor Relations Act:

> Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of the events which they summarize.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185-86 (1941).

Section 703(h) must therefore be read "against the background of the legislative history of Title VII and the historical context from which the Act arose." United

Steelworkers v. Weber, 443 U.S. at 201. The relevant aids to the construction of § 703(h) -- the legislative materials concerning the statute, the prior decisions of this Court, and the history and purpose of Title VII -- all demonstrate that, in the circumstances of this case, § 703(h) does not immunize a post-Act seniority system which perpetuates intentional discrimination.[28]

B. The Legislative History of § 703(h), Analyzed in Prior Decisions of this Court, Establishes that the Statute Does Not Exempt Post-Act Seniority Systems which Perpetuate Intentional Discrimination and Segregation.

Petitioners argue that, in enacting § 703(h), Congress sought to assure that Title VII would "not interfere with job

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28/ Neither Alexander v. Aero Lodge 735, 565 F.2d 1364 (6th Cir.1977), cert. denied,

seniority," 110 Cong. Rec. 5423 (1964) (remarks of Sen. Humphrey), and that it "would not affect seniority at all." Id. at 7207 (remarks of Sen. Clark). See Company Brief at 15-20; Union Brief at 25-27. In relying on these and similar isolated statements in the legislative record, petitioners have proved too much. As this Court held in Franks v. Bowman Transportation Co., 424 U.S. 727 (1976), Title VII does affect seniority rights accrued after the effective date of the Act. The Court

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28/ cont'd.

436 U.S. 946 (1978), nor Hameed v. Iron Workers Local 396, 637 F.2d 506 (8th Cir. 1980), nor any of the other lower court decisions cited by the company (Brief at 25-26 n.32) and the union (Brief at 9 n.5) discusses the relevant legislative materials or the history and purpose of Title VII. Those cases simply do not address the question presented here.

in Franks held that, in enacting § 703(h), Congress did not intend to bar an award of retroactive seniority to the identifiable victims of unlawful discrimination. 424 U.S. at 757-62. To the contrary, such relief ordinarily is required under Title VII, and it may go back as far as the effective date of the Act, notwithstanding its effect of diminishing the seniority rights of other, arguably innocent, employees. Id. at 762-70. See also Teamsters, 431 U.S. at 346-48, 356-57. "'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.'" Franks, 424 U.S. at 775, quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971).

Thus, despite the isolated statements quoted by petitioners, Congress clearly did not intend to enact an impenetrable barrier of protection for all seniority systems. When read in the context of the history and purpose of Title VII, these statements and the other legislative materials concerning § 703(h) demonstrate that Congress did not intend to immunize post-Act seniority systems which perpetuate past intentional discrimination.

As the petitioners appear to concede, there is no indication in the legislative history that Congress directly addressed the question presented by this case. Rather, congressional concern and debate were focused on the question whether "established" or "existing" seniority rights would be affected.

In its opinions in Franks and Team-

sters, this Court extensively reviewed the legislative history of § 703(h). As the Court noted in Franks, the initial bill reported by the House Judiciary Committee, H.R. 7152,[29/] did not contain § 703(h) or any other reference to seniority. 424 U.S. at 759. Although the majority Judiciary Committee report did not mention the subject of seniority, the minority report "charged that [the bill] would destroy existing seniority rights." Teamsters, 431 U.S. at 350 (emphasis added) (footnote omitted). See H.R. Rep. No. 914, 88th Cong., 1st Sess. 65-66, 71 (1963) (minority report). Representative Dowdy, a member of the Judiciary Committee minority, argued on the House floor that the bill would require

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29/ H.R. 7152, 88th Cong., 1st Sess. (1963). See H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

revision of "established seniority" rights. 110 Cong. Rec. 2726 (1964).[30] He therefore offered an amendment whose purpose was to "make the seniority system or merit system of hiring an exception to the rule of race, color, creed, and so on, in order that an employer may make a hiring decision or determination based on the merit system or seniority system ...." Id. at 2725.[31]

30/ Other members of the House expressed similar concerns. See 110 Cong. Rec. 2557 (1964) (remarks of Reps. Winstead and Ashmore); id. at 2560 (remarks of Rep. Alger).

31/ The Dowdy amendment provided as follows:

> The provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system; (2) a merit system; (3) a system which predicates its practices upon ability to produce, either in quantity or quality; or (4) a determination based on any factor other than race, color, religion, or national origin.

110 Cong. Rec. 2727-28 (1964).

The Dowdy amendment was defeated without discussion or debate, id. at 2728, and on February 10, 1964, H.R. 7152 passed the House. Id. at 2804-05.

When the bill went to the Senate, it still did not contain § 703(h) or any other reference to seniority systems. Since the bill was not referred to any standing committee but instead went directly to the Senate floor, there is no Senate committee report providing any insight into legislative intent. See Vaas, Legislative History: Title VII, 7 B.C. Ind. & Com. L. Rev. 431, 443-44 (1966) (hereinafter "Vaas"). However, the bill was extensively debated on the floor of the Senate in the course of a prolonged filibuster. The subject of seniority surfaced during this debate. Franks, 424 U.S. at 759. Senate critics of the bill reiterated the fears expressed

by House opponents that Title VII would require preferential hiring of minorities to achieve racial balance, and that the minorities hired would then be given special seniority rights placing them ahead of incumbent whites.[32/] Supporters of the bill responded that Title VII "would not affect" seniority rights,[33/]

32/ For example, Senator Hill of Alabama argued that Title VII "would undermine ... the seniority system" and "would force employers and unions, both, to discriminate, to hire by race ...." 110 Cong. Rec. 486, 487 (1964). He asserted that "[r]acial balance might be required in every position .... Race -- not ability, not seniority, and union contracts notwithstanding -- would be the first criterion -- the exact opposite of what the language of the bill apparently says." Id. at 488. As Senator Hill read the bill, "[n]ondiscrimination is no longer sufficient; preferential treatment is demanded. It is to preferential treatment, as embodied in this bill, that I most vigorously object." Id.

33/ See, e.g., 110 Cong. Rec. 5094 (1964) (remarks of Sen. Humphrey).

but opponents continued to argue that the bill "would destroy existing seniority systems ..." Franks, 424 U.S. at 759 (emphasis added). See also Teamsters, 431 U.S. at 350 and n.33.[34/]

It was in response to these claims that Senator Clark,[35/] on April 8, 1964, introduced into the Congressional Record

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34/ For example, Senator Stennis of Mississippi asserted that Title VII would "require employment on the basis of race, and so forth," and would mandate "[p]referential advance of minorities so as to destroy seniority in employment, civil service and apprenticeship programs ...." 110 Cong. Rec. 7091 (1964).

35/ "Bipartisan captains" were selected for each title of the bill in the Senate. Senators Clark of Pennsylvania and Case of New Jersey were the bipartisan captains responsible for explaining Title VII, defending it, and leading discussion on it during the Senate debate. 110 Cong. Rec. 6528 (1964) (remarks of Sen. Humphrey); Vaas at 444-45. See Teamsters, 431 U.S. at 351 n.35.

three documents containing, inter alia, statements explaining the bill's effect on seniority rights. See Franks, 424 U.S. at 759-61; Teamsters, 431 U.S. at 350-51. "While these statements were made before § 703(h) was added to Title VII, they are authoritative indicators of that section's purpose." Teamsters, 431 U.S. at 352. These statements unequivocally demonstrate that the purpose of § 703(h) was to assure the bill's opponents that Title VII would not require preferential treatment of minorities at the expense of seniority rights existing at the time Title VII took effect.

The first of the three documents introduced by Senator Clark was a statement prepared by the Department of Justice at Senator Clark's request to rebut the argu-

ments made by Senator Hill. 110 Cong. Rec. 7206-07 (1964). See Teamsters, 431 U.S. at 351 n.36. This statement specifically declared that Title VII would not "undermine vested rights of seniority" and would have "no effect on seniority rights existing at the time it takes effect." Id. at 7207 (emphasis added).[36/] The second document was an interpretive memorandum submitted jointly by Senators Clark and Case.

36/ The portion of the Justice Department statement pertinent to seniority reads in full:

> First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to

Id. at 7212-15. This memorandum stated that Title VII "would have no effect on established seniority rights. Its effect is prospective and not retrospective."

36/ cont'd.

discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employ-

Id. at 7213 (emphasis added).[37/] The third document submitted by Senator Clark was a set of answers to questions posed by Senator Dirksen. Id. at 7215-17. In response

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36/ cont'd.

> ers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

110 Cong. Rec. 7207 (1964).

37/ The full text of the section of the Clark-Case memorandum pertaining to seniority states:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged -- or indeed, permitted -- to fire whites in order to hire Negroes, or to prefer Negroes

to a question about seniority, Senator Clark stated that "[t]he bill is not retroactive, and it will not require an employer to change existing seniority lists." Id. at 7217 (emphasis added).[38/]

37/ cont'd.

> for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)

110 Cong. Rec. 7213 (1964).

38/ Two of the questions and answers pertained to seniority:

> Question: Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first

Following the introduction of these documents into the Record, the filibuster continued. Several weeks later, after a number of informal conferences among the Senate leadership, the House leadership,

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38/ cont'd.

> fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first to be fired and the remaining employees are white?
>
> Answer: Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.
>
> Question: If an employer is directed to abolish his employment list because of discrimination what happens to seniority?
>
> Answer: The bill is not retroactive, and it will not require an employer to change existing seniority lists.

110 Cong. Rec. 7217 (1964).

the Attorney General and others, a compromise substitute bill prepared by Senators Mansfield and Dirksen was introduced on the Senate floor. 110 Cong. Rec. 11926, 11930-34 (1964). Franks, 424 U.S. at 760-61. See Vaas at 431, 445-46. The Mansfield-Dirksen proposal was offered as a substitute for the entire bill in an effort to bring an end to the filibuster. See 110 Cong. Rec. 12706-07 (1964). The language of § 703(h) pertaining to seniority appeared in its final form in the substitute bill. Id. at 12813.

One of the principal goals of the compromise substitute bill was to resolve the ambiguities in the House-passed version of H.R. 7152. Teamsters, 431 U.S. at 352. See 110 Cong. Rec. 11935-37 (1964) (remarks of Sen. Dirksen); id. at 12707 (remarks of Sen. Humphrey). "As the debates indicate,

one of those ambiguities concerned Title VII's impact on existing collectively bargained seniority rights." Teamsters, 431 U.S. at 352 (emphasis added). Senator Humphrey explained that, in resolving this particular ambiguity, § 703(h) "does not narrow application of the title, but merely clarifies its present intent and effect." 110 Cong. Rec. 12723 (1964). See also id. at 12818-19 (remarks of Sen. Dirksen). There was no further attempt to amend the language of the statute pertaining to seniority systems.[39/] Title VII, including § 703(h), subsequently was passed by both the Senate, id. at 14511, and the House,

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39/ Section 703(h) was amended, however, to provide that it shall not be unlawful "for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to

id. at 15897, and it was signed into law on July 2, 1964, as part of the Civil Rights Act of 1964. Id. at 17783.

Based upon its review of the legislative history in Franks, the Court concluded as follows:

> [W]hatever the exact meaning and scope of § 703(h) in light of its unusual legislative history and the absence of the usual legislative materials, see Vaas, supra, at 457-458, it is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act ....

424 U.S. at 761. Justice Powell, joined by

39/ cont'd.

discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h). For a discussion of the legislative history of this amendment, see Griggs v. Duke Power Co., 401 U.S. 424, 434-36 (1971). Following this amendment,

Justice Rehnquist, agreed with the majority that "the 'thrust' of that section is the validation of seniority plans in existence on the effective date of Title VII." Id. at 791 (concurring in part and dissenting in part) (emphasis added); see id. at 780 (Burger, C.J., agreeing generally with Justice Powell).

Similarly, in Teamsters the Court found that Congress was concerned with

> Title VII's impact on existing collectively bargained seniority rights. It is apparent that § 703(h) was drafted with an eye toward meeting the earlier criticism on this issue with an ex-

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39/ cont'd.

the seniority provision of § 703(h) was largely ignored in the legislative debates, and the statute was characterized almost exclusively as a provision protecting job-related employment tests. See, e.g., 110 Cong. Rec. 15896 (1964) (remarks of Rep. Celler); id. at 16002 (comparative analysis of House and Senate bills prepared by Rep. McCulloch and introduced by Sen. Dirksen).

> plicit provision embodying the understanding and assurances of the Act's proponents: namely, that Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act. ...
>
> In sum, the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. ... [T]he congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

431 U.S. at 352-53 (emphasis added; citations and footnotes omitted).

Thus, as the Court concluded in both Franks and Teamsters, the legislative history of § 703(h) demonstrates that this

section was designed to protect seniority rights acquired prior to the effective date of Title VII. In United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), the Court extended this protection to the operation of a pre-Act system that perpetuated the effects of a post-Act discriminatory discharge which was not the subject of a timely charge by the discriminatee.[40/] Although the system gave present effect to a past act of discrimination, the employer

> was entitled to treat that past act as lawful after [plaintiff] failed to file a [timely] charge of discrimination .... A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed .... [S]eparately considered, it is merely an unfortunate event in history which has no present legal consequences.

Id. at 558.

40/ The Court also applied the Evans holding in Teamsters, 431 U.S. at 348 n.30.

Contrary to the company's assertion (Brief at 22-23), Evans does not read § 703(h) as barring an attack on a system which was adopted after the effective date of Title VII.[41/] Rather, Evans holds that a bona fide seniority system in existence when Title VII took effect may be protected when it perpetuates either pre-Act discrimination (which was not illegal) or post-Act discrimination which was not the subject of a timely charge (and therefore is the legal equivalent of pre-Act discrimination). But "[t]he statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory." 431 U.S. at 560. Evans

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41/ The Fourth Circuit en banc affirmed the district court's application of Evans to this case. (App. 146-47). The petition for certiorari did not present this issue for review.

does not discuss the legislative history of § 703(h), and it says nothing about a seniority system which, although instituted after Title VII made it clear that discriminatory employment practices were illegal, nevertheless perpetuated the effects of past intentional discrimination and had no adequate business justification. Regardless of when that past discrimination occurred, whether before or after the effective date of Title VII, such a system is not protected by § 703(h).[42/]

42/ Petitioners also rely on statements in two later opinions that, "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences," Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977), and that "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems." California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980). However, the issue in Hardison was the extent of an employer's

In sum, the legislative history demonstrates that the language of § 703(h) was designed to incorporate the assurances of Title VII's sponsors that seniority rights accumulated by whites under pre-existing bona fide systems would not be overriden by special seniority rights for minorities. While recognizing that such pre-Act seniority systems may "'operate to freeze the status quo of prior discriminatory employment practices,'" Congress nonetheless "extended a measure of immunity to them." Teamsters, 431 U.S. at 349-50,

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42/ cont'd.

obligation under Title VII to accommodate the religious observances of its employees, 432 U.S. at 66, and the issue in California Brewers was the definition of the term "seniority system" in § 703(h), 444 U.S. at 601. See Argument II, infra. Neither opinion decides or even discusses the question presented here.

quoting Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). However, nothing in the legislative history indicates that Congress had the same solicitude for seniority systems instituted after the effective date of Title VII, when employers and unions were on notice of their legal duty not to discriminate. To the contrary, as this Court held in Franks, Congress intended to override post-Act seniority rights to the extent necessary to provide an effective remedy for discrimination.

C. The Historical Context and the Purpose of Title VII Confirm this Court's Prior Analysis of the Language and Legislative History of § 703(h).

1. The Historical Context: The Lines of Progression Instituted in 1968 Were Superimposed on a Pre-Existing Structure of Intentional Discrimination and Segregation.

The language of Title VII must be read

not only in the context of its legislative history but also in "the historical context from which the Act arose." United Steelworkers v. Weber, 443 U.S. at 201. The historical record undergirding Title VII shows that, for more than a hundred years after the Emancipation Proclamation, the American workplace was marked by deliberate practices designed to restrict black workers to inferior positions and to exclude them altogether from desirable, skilled, high paying jobs.[43/] These practices were

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43/ For a full discussion of the history of blacks in the American workplace, see S. Spero and A. Harris, The Black Worker (1931) (Atheneum ed. 1974). See also G. Myrdal, An American Dilemma at 1079-1124 (1944) (Harper & Row ed. 1962). A thorough discussion of black workers during the period from World War I through World War II is found in R. Weaver, Negro Labor, A National Problem (1946), and of blacks in labor unions in R. Marshall, The Negro and Organized Labor (1965); R. Marshall and V. Briggs, The Negro and Apprenticeship

nowhere more prevalent than in the tobacco industry, in which black employment had its origins in slavery. Both the history of the tobacco industry in the South[44/] and the record in this case[45/] make it clear that the post-Title VII adoption of the "senior-

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43/ cont'd.

(1967); and H. Northrup, Organized Labor and the Negro (1944). For more recent discussions, see H. Hill, Black Labor and the American Legal System: Race, Work and the Law (1977), and W. Gould, Black Workers in White Unions (1977).

44/ For a thorough discussion of the history of blacks in the tobacco industry, see H. Northrup, The Negro in the Tobacco Industry (1970) (hereinafter "Northrup"); G. Starnes and J. Hamm, Some Phases of Labor Relations in Virginia at 36-70 (1934) (hereinafter "Starnes and Hamm"). See also R. Marshall, Labor in the South at 215-17 (1967); H. Northrup, Organized Labor and the Negro at 102-18; S. Spero and A. Harris, The Black Worker at 322-23; Johnson, The Conflict of Caste and Class in an American Industry, 42 Am. J. Soc. 55 (1936).

45/ See pp. 8-27, supra.

ity system" at issue here perpetuated overt racial bars imposed by the company and the union in the past.

Blacks have worked in the tobacco industry since its inception in colonial Virginia. H. Northrup, The Negro in the Tobacco Industry at 1 (1970) (hereinafter "Northrup"); G. Starnes and J. Hamm, Some Phases of Labor Relations in Virginia at 37-39 (1934) (hereinafter "Starnes and Hamm"). Through the first half the 19th century, when tobacco manufacturing was concentrated in Virginia and North Carolina, the industry's labor force was composed almost exclusively of black slaves. Northrup at 2; Starnes and Hamm at 37; Johnson, The Conflict of Caste and Class in an American Industry, 42 Am. J. Soc. 55, 56-57 (1936) (hereinafter "Johnson"). During this period, Richmond, Virginia, was

the center of the "slave for hire" market, in which masters hired their slaves out to the tobacco manufacturers. Northrup at 18-19. See also Starnes and Hamm at 37-39.

For two decades after the Civil War, blacks continued to hold most of the non-supervisory jobs in tobacco factories. In the 1880s, however, when cigarette machines were introduced, the companies began to remove black hand rollers from fabrication jobs and replaced them with white machine operators, most of whom were women. White males were hired as mechanics and set-up men. Blacks remained in the prefabrication jobs, and white males remained in the supervisory and white collar jobs. Northrup at 3, 21-22; Johnson, 42 Am. J. Soc. at 60. See Starnes and Hamm at 62. By 1900, the number of black workers had been substantially reduced, and the rigid pattern of

segregation which thereafter characterized the industry was firmly in place. Northrup at 21. This pattern included not only occupational but also physical segregation: blacks were confined to the lowest paying jobs with the poorest working conditions, usually in separate buildings or at least on separate floors from the white departments. Id. at 3-5, 22; Johnson, 42 Am. J. Soc. at 59-61.

Blacks continued to hold more than 60 percent of the jobs in the tobacco industry until the 1930s. Northrup at 22-26. See Starnes and Hamm at 36-37, 58-62, 66-67. Then, however, mechanization began to take more and more black jobs. Despite their long seniority in the industry, the displaced black workers were not permitted to move into segregated white jobs. Northrup at 26. According to a contemporary

description of this process,

> The progressive substitution of machinery for hand processes has created new tasks and destroyed old and honorable skills. With each advance in machinery there has been an increase in white male and female labor. Lacking the protection of that caste sentiment which preserved to the Negro jobs in which he once seemed to have some sort of vested interest, these workers have found themselves holding only those jobs which were "secured" to them by low wages, disagreeable dust, and by tasks regarded as too heavy for native-born white Americans.

Johnson, 42 Am. J. Soc. at 58. See also id. at 64-65. Blacks were left with "'the disagreeable, unskilled labor which because of its dusty, dirty and unsanitary character is distasteful to the whites.'" Starnes and Hamm at 37, quoting L. Greene and C. Woodson, The Negro Wage Earner at 285 (1930).

The Tobacco Workers International Union, which has represented employees at most of the major tobacco companies (in-

cluding American Tobacco) since the 1930s, organized racially segregated locals which institutionalized the existing pattern of segregated jobs and facilitated the process of reducing the number of blacks in the work force. Northrup at 33-35; R. Marshall, Labor in the South at 216-17 (1967).[46/] The exclusionary policies of the craft unions operated as an addi-

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46/ "In some areas, such as Durham, there was good cooperation among Negro and white leadership. In Richmond, however, the union movement affiliated with the American Federation of Labor was at first quite antagonistic to Negroes." Northrup at 35. Until it was challenged in 1937 by a rival union, the Tobacco Workers International Union (TWIU) in Richmond did not attempt to organize black workers for 20 years. H. Northrup, Organized Labor and the Negro at 114. Cf. S. Spero and A. Harris, The Black Worker at 322-23. When the TWIU finally sought to represent blacks at the American Tobacco Company's smoking tobacco plant in Richmond, it proposed segregated bargaining units. Northrup, Organized Labor and the Negro at 114-15. The National Labor Relations Board rejected this proposal and certified a single unit for both races.

tional barrier to opportunities for blacks. Northrup at 38.[47] The unions reinforced the segregated pattern established by the employers, and the Tobacco Workers Union "represented its white members well to the detriment of, and at the expense of, its Negro members." Id. at 39. See R. Mar-

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46/ cont'd.

See Matter of American Tobacco Co., 9 NLRB 579 (1938); 10 NLRB 1171 (1939). Nevertheless, the three white locals at American Tobacco's Durham, Reidsville, and Richmond plants thereafter jointly negotiated one collective bargaining agreement with management, while each of the three black locals made separate agreements. Professor Northrup observed in 1944 that, while "the white leaders usually assist the Negroes in their negotiations, ... the co-operation between the white and colored locals in the American Tobacco plants is decidedly limited in scope." Northrup, Organized Labor and the Negro at 113. See also R. Marshall, Labor in the South at 217.

47/ "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers v. Weber, 443 U.S. at 198 n.1.

shall, Labor in the South at 216-17. While cigarette employment was expanding in mechanized jobs open almost exclusively to whites, black members of the Tobacco Workers Union were laid off with little or no union opposition and were replaced by machines operated by whites. Northrup at 39. As a result of this process, black workers -- who had monopolized employment in the tobacco industry from colonial times to the late 19th century, and who had then held a clear majority of the industry's jobs until the 1930s -- found in 1960 that they held only 25 percent of the jobs. Their sharply reduced share of the jobs, moreover, continued to be rigidly segregated. Id. at 33. Government pressure in the 1960s brought about some changes in overt segregationist policies, but by that time the continuing impact of automation and the declining demand for tobacco

products had severely limited job opportunities in the industry. Id. at 40-41.[48/]

In the seminal case of Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), Judge Butzner reviewed the history of segregation and racial discrimination at a typical southern tobacco company and the use of restrictive departmental transfer and seniority practices to perpetuate this history. 279 F. Supp. at 510-14.[49/] The court in Quarles found

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48/ For example, in response to pressure from President Kennedy's Committee on Equal Employment Opportunity to open up all departments to all races, the tobacco companies simply tacked their black seniority lists onto the bottom of the lists for the white departments, and vice versa. Because there were few openings of any kind, this limited change in form resulted in little or no improvement in the substance of black opportunities for upward movement. Northrup at 40-41.

49/ The practices at Philip Morris were essentially the same as those followed by other tobacco manufacturers, Northrup at 78, including the American Tobacco Company, id. at 64-66.

that, although there had been no discrimination in hiring or initial assignment since 1966, restrictive departmental transfer policies -- including forfeiture of accrued departmental seniority rights upon transfer -- imposed "restrictions upon the present opportunities for Negroes result[ing] from the racial pattern of the company's employment practices prior to January 1, 1966." 279 F. Supp. at 513. Based on a review of the legislative history concerning § 703(h) and Title VII's application to pre-Act seniority systems, the court concluded that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." Id. at 516.

The court in Quarles found that the seniority system at Philip Morris had its genesis in the racially discriminatory

employment pattern typical of the tobacco industry, and that present differences in treatment under the system were the result of intentional discrimination against blacks. The court therefore held that the seniority system was not a bona fide system protected by § 703(h). Id. at 516-18. Since the system perpetuated past discrimination and was not justified by business necessity, it violated Title VII: "[T]he restrictive departmental transfer and seniority provisions of the collective bargaining agreement are intentional, unlawful employment practices because they are superimposed on a departmental structure that was organized on a racially segregated basis." Id. at 510.[50/]

50/ In Teamsters this Court held that an "otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-

The record in the present case demonstrates that the industry-wide pattern of intentional discrimination and segregation prevailed at American Tobacco's facilities in Richmond. See pp. 8-27, supra. Like the restrictive departmental transfer and seniority provisions in Quarles, the lines of progression in the present case were "superimposed on a departmental structure that was organized on a racially segregated basis." Quarles v. Philip Morris, 279 F. Supp. at 510. The company and the union thus seek to apply § 703(h) to a system

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Act discrimination." 431 U.S. at 353-54. The Court noted, however, that Quarles and the cases that followed it were consistent with Teamsters insofar as they held that "a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption." 431 U.S. at 346 n.28.

which they imposed after the effective date of Title VII on their own pre-existing structure of intentional discrimination and segregation. It is within this context, as well as the larger historical context of the racial practices of the tobacco industry as a whole, that the statutory language, the legislative history, and the judicial decisions construing § 703(h) must be considered.

2. The Purpose of Title VII: Section 703(h) Provides a Narrow Exemption from Title VII's Broad Prohibition of Discriminatory Employment Practices.

The Civil Rights Act of 1964 was the first comprehensive federal legislation ever to address the pervasive problem of discrimination against blacks in modern American society. See M. Sovern, Legal Restraints on Racial Discrimination in Em-

ployment 8 (1966). Extensive hearings had focused the attention of Congress on the adverse social and economic consequences of discrimination against blacks in employment and other fields,[51/] and when the House Judiciary Committee issued its report on the bill which became the Civil Rights Act of 1964, it clearly stated that a primary objective of the Act was to eliminate the effects of discrimination against black citizens:

> In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against

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51/ See, e.g., Hearings on Equal Employment Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. 3, 12-15, 47-48, 53-55, 61-63 (1963); Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2300-03 (1963); Hearings on Equal Employment Opportunity Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 116-17, 321-29, 426-30, 449-52, 492-94 (1963).

> Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.
>
> * * *
>
> No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities....
>
> It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination....

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in [1964] U.S. Code Cong. & Ad. News 2391, 2393.

In United Steelworkers v. Weber, this Court reviewed the legislative history and concluded that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil

Rights Act of 1964 was with 'the plight of the Negro in our economy.'" 443 U.S. at 202, quoting 110 Cong. Rec. 6548 (remarks of Sen. Humphrey). Congress recognized that blacks were largely relegated to unskilled and semi-skilled jobs, that because of automation the number of such jobs was rapidly decreasing, and that since the 1940s the relative position of the black worker had steadily worsened. Id. This pattern was especially pronounced in the tobacco industry, where black workers were systematically replaced by white-operated machines, with little or no opposition from the white-dominated unions. See pp. 63-68, supra. Congress further recognized that, unless this trend were reversed, the goal of the Civil Rights Act -- "the integration of blacks into the mainstream of American society" -- could not be achieved. 443 U.S. at 202-03. Therefore,

"it was clear to Congress that 'the crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' 110 Cong. Rec. 6548 (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed." Id. at 203.

This problem was especially acute in the tobacco industry, see pp. 63-68, supra, and Congress intended to take effective action to correct it. The enactment of Title VII was "triggered by a Nation's concern over centuries of racial injustice and [was] intended to improve the lot of those who had 'been excluded from the American dream for so long'...." United Steelworkers v. Weber, 443 U.S. at 204, quoting 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey). As this Court has

consistently held, "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." Franks v. Bowman Transportation Co., 424 U.S. at 763 and cases cited therein. See also County of Washington v. Gunther, 49 U.S.L.W. 4623, 4628 (1981). The sweeping terms of the statutory prohibition of discrimination reflect the congressional purpose: it is unlawful "to fail ... to hire or to discharge ... or otherwise to discriminate ... with respect to ... compensation, terms, conditions, or privileges of employment," or "to limit, segregate, or classify ... in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect

his status." 42 U.S.C. § 2000e-2(a) (emphasis added). "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." County of Washington v. Gunther, 49 U.S.L.W. at 4628, quoting S. Rep. No. 867, 88th Cong., 2d Sess. 12 (1964).

In § 703(h), Congress provided a narrow exemption from this broad prohibition of discriminatory practices. As the Court stated in Teamsters, this provision "does not immunize all seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race....'" 431 U.S. at 353. In California Brewers Association v. Bryant, 444 U.S. 598 (1980), the Court reiterated its view that § 703(h)

must not "be given a scope that risks swallowing up Title VII's otherwise broad prohibition of 'practices, procedures and tests' that disproportionately affect members of those groups that the Act protects." Id. at 608.

The Court's interpretation of § 703(h) thus accords with the longstanding principle of statutory construction that a remedial statute should "be given a liberal interpretation ... [and] exemptions from its sweep should be narrowed and limited to effect the remedy intended." Piedmont & Northern Railroad Co. v. ICC, 286 U.S. 299, 311-12 (1932). See also Group Life and Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979); Abbott Laboratories v. Portland Retail Druggists Association, 425 U.S. 1, 12 (1976); Payton v. Rowe, 391 U.S. 54, 65 (1968). Like the general prohibitions of discrimination contained in

§§ 703(a) and (d), the exception provided by § 703(h) "must ... be read against the background of the legislative history of Title VII and the historical context from which the Act arose," United Steelworkers v. Weber, 443 U.S. at 201, and it must be interpreted in a manner which does not "'bring about an end completely at variance with the purpose of the statute'...." Id. at 202, quoting United States v. Public Utilities Commission, 345 U.S. 295, 315 (1953). In view of the broad approach adopted by Congress, the Court "must ... avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." County of Washington v. Gunther, 49 U.S.L.W. at 4628.

The importance of seniority rights in the modern workplace supports the proper

construction of § 703(h) as a narrow exception which should not be allowed to defeat the fundamental purpose of Title VII. As the Court stated in Franks:

> Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. ... Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority). ... We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." ... "More than any other provision of the collective [-bargaining] agreement ... seniority affects the economic security of the individual employee covered by its terms." ...

424 U.S. at 766 (citations omitted). See also Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring

and Promotion, 82 Harv. L. Rev. 1598, 1601-07 (1969).

This Court recognized in Franks that, because seniority rights are so important, the victims of illegal racial discrimination are presumptively entitled to awards of retroactive seniority which will, insofar as possible, restore them to the positions they would have held in the absence of discrimination. Seniority relief therefore may be denied "'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" 424 U.S. at 771, quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). For the same reasons, § 703(h) should be interpreted in a manner which, while recognizing the intent of Con-

gress to protect bona fide pre-Act seniority systems from liability, does not undermine the fundamental purposes of Title VII. Section 703(h) was not intended to be an instrument for depriving black workers of the seniority rights which are essential if they are to achieve their rightful place in the mainstream of American society.

D. The Policies Underlying Title VII Support The Conclusion that § 703(h) Does Not Immunize Post-Act Seniority Systems Which Perpetuate Intentional Discrimination and Segregation.

Strong public policies support both collective bargaining and equal employment opportunity. In the National Labor Relations Act, Congress expressed a national labor policy "'encouraging the practice and procedure of collective bargaining.'" Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62

(1975), quoting 29 U.S.C. § 151. In the Civil Rights Act of 1964, "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.'" Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974), quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

The resolution of a potential conflict between these policies depends upon the intent of Congress as to which policy should prevail in a particular factual context. See Alexander v. Gardner-Denver Co., 415 U.S. at 60 n.21. For example, in Trans World Airlines v. Hardison, where there was no evidence of past discrimination that required a remedy, the Court determined that the policies supporting both collective bargaining and equal opportunity weighed against the abrogation of the seniority rights of some employees

in order to accommodate the religious needs of others. 432 U.S. at 79 n.12. On the other hand, in Franks v. Bowman Transportation Co., the Court concluded that the congressional policies outlawing discrimination and requiring a "make whole" remedy outweighed the policy favoring collective bargaining. The Court held that, under Title VII, the victims of unlawful discrimination ordinarily are entitled to retroactive seniority even though such relief diminishes the collectively bargained seniority rights of other, arguably innocent, employees. 424 U.S. at 763-66, 773-79.

In the factual and historical context presented here, the congressional policy requiring equal employment opportunity outweighs any policy which might be served by authorizing employers and unions to adopt new seniority systems which

have no business justification and which perpetuate their own intentional discrimination.

American Tobacco's Richmond and Virginia branches were operated on a strictly segregated basis until 1963. As in the rest of the industry, blacks were assigned to the prefabrication departments, while fabrication department jobs, which paid higher wages and had better working conditions, were reserved for whites. See pp. 8-11, supra. Although this system of overt segregation was modified in 1963, racially motivated discrimination continued. Until 1968, black employees were excluded from white jobs by means of intentionally discriminatory promotional policies. Under the guise of evaluating "interest" in vacancies and "qualifications" for promotions, the virtually all-white supervisory force continued to

restrict black employees to the historically "black" jobs. See pp. 11-16, supra.

It was against this background that the company and the union instituted the lines of progression.[52/] Under the new system, when a vacancy occurred in a top job in a line of progression, only employees who had held a lower job in that line were eligible to bid for the vacancy. Regard-

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52/ This case does not present the situation, suggested by the union, of a pre-Act seniority system which might have been protected by § 703(h) but then was modified after the effective date of Title VII in a manner which increased employment opportunities for minorities. Union Brief at 28-29; see Company Brief at 30-31. In the present case, the post-Act line-of-progression system did not replace or modify a pre-existing bona fide seniority system. Instead, it replaced an intentionally discriminatory promotional selection policy which was never protected by § 703(h). Cf. California Brewers Ass'n v. Bryant, 444 U.S. at 608-09. See Argument II, infra. Moreover, the line-of-progression system, far from expanding opportunities for minorities, perpetuated the effects of prior intentional discrimination. See pp. 17-27, supra.

less of their seniority, skill, and ability, employees outside the lines of progression were precluded from bidding for jobs at the top of the lines. The new system, superimposed on the rigidly segregated employment pattern of the past, effectively denied black employees the opportunity to advance to traditionally white jobs. As the Fourth Circuit stated:

> Most of these jobs [in the lines of progression] were in the fabrication departments. Since black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority. In this respect, the lines of progression perpetuated the effects of past discrimination in a manner similar to the formerly segregated departmental seniority rosters.

(App. 78-79). See pp. 17-27, supra.

Thus, the system of overt job and departmental segregation was replaced in 1963 by a system of intentional discrimination in promotions, which in turn was replaced in 1968 by the line-of-progression

system. The lines of progression preserved the advantageous position white employees had gained as a result of the prior segregation and intentional discrimination. A combined total of more than 80 percent of the white employees at the Virginia and Richmond branches hold jobs in the seven white lines of progression.[53/] As a result of the prior practices of segregation and discrimination by the company and the union, these white employees are now eligible for promotion to the high paying jobs at the top of the white lines of progression.[54/] Conversely, most black em-

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53/ In 1973, there were 702 white hourly paid, non-craft employees at the Virginia and Richmond branches combined. Approximately 585, or 83 percent, of these white employees held jobs in the seven white lines of progression. (Ex. App. 158-62).

54/ The highest paid hourly non-craft jobs at both branches are at the top of the seven white lines of progression (Ex. App. 155-62).

ployees are now denied access to the top jobs in these lines because they were excluded from the lower jobs in the past on the basis of race. Consequently, by 1973, after the line-of-progression system had been in effect for five years, the top jobs in the historically white lines were held by 120 white employees and by only one black employee. (Ex. App. 158-62).

The case before the Court therefore concerns the post-Act adoption of a line-of-progression system which has perpetuated past intentional discrimination by the employer and union involved. It does not concern the post-Act adoption of a seniority system which has a discriminatory impact on minorities or women for some other reason -- e.g., because women have only recently entered the labor market in certain industries and therefore have accrued little seniority, or because

minorities have only recently moved into the geographical area from which an employer draws its work force and therefore have not been employed as long as most whites. It therefore is unnecessary for the Court to decide whether, in such circumstances, seniority systems adopted after the effective date of Title VII may be protected by § 703(h) despite their discriminatory impact. Such systems arguably may be justified by a "national labor policy encouraging ... free collective bargaining and recognizing the importance, diversity and changing nature of seniority practices." Company Brief at 29; see also Union Brief at 29-31. It is not "national labor policy," however, to encourage employers and unions to adopt new seniority systems which perpetuate their own intentional discrimination against black workers. It manifestly is not

"national labor policy" to condone such conduct where, as here, the new system is not necessary to the safe and efficient operation of the business in question.[55/]

The Court "has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." Franks, 424 U.S. at 778 (footnote omitted) and cases cited therein. Cf. Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944). In the present case, as in Franks, the strong public policy interest in terminating the effects

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55/ As noted by the company, the Griggs standard of business necessity is "exacting." Company Brief at 27 n.34. It is not, however, fatal to every seniority system to which it is applied. Indeed, in this very case the district court held that three of the nine lines of progression were justified by business necessity and were therefore lawful despite their discriminatory impact. (App. 31-32).

of racial discrimination is paramount. This policy confirms the conclusion that Congress did not intend to immunize post-Act seniority systems which perpetuate prior intentional discrimination.

Contrary to the company's assertion, in the circumstances of this case there is no conflict whatsoever between the Fourth Circuit's interpretation of § 703(h) and the principles of affirmative action set forth in United Steelworkers v. Weber. Company Brief at 30-32; see Union Brief at 28-29.[56/] The lines of progression es-

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56/ The union hypothesizes a case in which a pre-Act system based on job seniority is converted after the effective date of Title VII to a departmental seniority system. The union argues that such post-Act modifications of seniority systems should not be discouraged because they "would broaden mobility, and thus benefit pre-Act discriminatees...." Union Brief at 28. In the present case, however, the system was not "broadened"; to the contrary, it was narrowed from an ostensible branch-wide

tablished in 1968 were not "designed to break down old patterns of racial segregation and hierarchy," nor were they intended "to eliminate a manifest racial imbalance." Weber, 443 U.S. at 208. To the contrary, the line-of-progression system preserved the favored positions gained by white employees and perpetuated the disadvantages suffered by black employees as a result of decades of overt segregation and intentional discrimination by the company and the union. In effect, the company suggests that, by replacing its

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56/ cont'd.

system to a system which restricted advancement to those within the lines of progression. See pp. 11-27, supra. As is implicit in the union's hypothetical example, the change in the present case was detrimental to the victims of discrimination because it perpetuated the effects of segregated job assignments and intentionally discriminatory promotional policies.

overtly discriminatory system with a facially neutral system which perpetuated the effects of its prior intentional discrimination, it implemented an "affirmative action plan."[57/] In the factual context of this case, the imposition of the unnecessary line-of-progression system is no more deserving of protection from a Title VII challenge than the imposition of a non-job related test or educational requirement for entry into jobs which were

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57/ The company and the union did not argue or present evidence in the courts below that the line-of-progression system was an affirmative action plan. Nor do they describe in their briefs in this Court how the system qualifies as "affirmative action" or, more basically, how the system does not simply perpetuate the effects of intentional discrimination. In Weber the Court stressed "the narrowness of [the] inquiry" regarding affirmative action plans. 443 U.S. at 200. The petitioners' invitation to discuss aspects of affirmative action which are not presented by this case should be declined.

previously reserved for whites. See Griggs v. Duke Power Co., 401 U.S. at 428-33.

The relevant legislative materials, the prior decisions of this Court, and the history and purpose of Title VII all demonstrate that § 703(h) was not intended to immunize post-Act seniority systems which perpetuate intentional discrimination. In the circumstances of this case, the Fourth Circuit correctly held that the policy favoring collectively bargained seniority systems must give way to the paramount policy mandating equal opportunity in employment. Its judgment should be affirmed.

II. THE LINES OF PROGRESSION ARE NOT PART OF A "SENIORITY SYSTEM" WITHIN THE MEANING OF § 703(h).

The narrow exemption provided by § 703(h) applies to "bona fide seniority

... system[s]." 42 U.S.C. § 2000e-2(h). The majority of the panel below held that the lines of progression are not part of a "seniority system" and therefore are not protected by § 703(h). (App. 116). On rehearing, the majority of the en banc court recognized that there was "considerable support" for this "possible alternative basis for decision," but they found it unnecessary to decide the question because of their holding that § 703(h) has no application to post-Title VII seniority systems which perpetuate prior discrimination. (App. 142-43 n.3). The members of the panel majority concurred in this part of the en banc court's opinion but also reaffirmed their prior panel opinion. (App. 155). Respondents submit that this alternative basis for the judgment below is dispositive.

As the Court stated in California Brewers Association v. Bryant, "Title VII does not define the term 'seniority system,' and no comprehensive definition of the phrase emerges from the legislative history of § 703(h)." 444 U.S. at 605 (footnote omitted). The Court, however, has identified certain "core concepts of 'seniority'" as that term is used in § 703(h):

> In the area of labor relations, "seniority" is a term that connotes length of employment. A "seniority system" is a scheme that, alone or in tandem with non-"seniority" criteria, allots to employees ever improving employment rights and benefits as their relevant lengths of pertinent employment increase. Unlike other methods of allocating employment benefits and opportunities, such as subjective evaluations or educational requirements, the principal feature of any and every "seniority system" is that preferential treatment is dispensed on the basis of some measure of time served in employment.

Id. at 605-06 (footnotes omitted).

As the Court noted in Teamsters, seniority may be "measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression ...." 431 U.S. at 355 n.41. Thus, a system which allocates jobs or benefits on the basis of time served in a line of progression is a "seniority system" which may be protected by § 703(h).[58/] The lines of progression at issue here, however, do not allocate jobs or benefits on the basis of any measure of time served with the employer. To the contrary, these lines insulate the highest paid jobs at both branches from the operation of the

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58/ For a decision applying § 703(h) to a true line-of-progression seniority system, see Myers v. Gilman Paper Co., 25 FEP Cases 468 (S.D. Ga. 1981).

seniority system. When a vacancy occurs in one of the top jobs in a line of progression, only employees who have held a lower job in that line are eligible to bid on the vacancy. (App. 21-22). Length of time served in the line of progression is not a factor. Neither is length of time served in the lower job. Instead, the lines of progression impose a requirement of service in a lower job. This prior service requirement operates as a prerequisite for the application of the seniority system. Among the limited group of employees who satisfy this prerequisite and are therefore eligible to bid on a vacancy, branch seniority is applied to determine the successful bidder. Only the fact of service in the lower job is of any importance; the amount of time served in either the lower job or the line of progression has no effect

whatsoever. See p. 21 n.25, supra.

The lines of progression in the present case therefore have nothing to do with "seniority" as that term was defined in California Brewers. In that case the Court held that a threshold requirement of 45 weeks of service as a temporary employee for entry into a permanent employee seniority track was a component of a "seniority system" within the meaning of § 703(h). The Court stated as follows:

> The 45-week rule does not depart significantly from commonly accepted concepts of "seniority." The rule is not an educational standard, an aptitude or physical test, or a standard that gives effect to subjectivity. Unlike such criteria, but like any "seniority" rule, the 45-week requirement focuses on length of employment.
>
> Moreover, the rule does not distort the operation of the basic system established by the Agreement, which rewards employment longevity with heightened benefits.

444 U.S. at 609-10.

Here, by contrast, eligibility to bid on a job at the top of a line of progression has nothing to do with an employee's seniority "in a particular plant, in a department, in a job, or in a line of progression...." Teamsters, 431 U.S. at 355 n.41. Instead, eligibility for promotion is determined by mere service in a lower job classification, without any reference whatsoever to the amount of time served in that classification. In this respect the line-of-progression eligibility requirement is identical to any other non-seniority barrier to advancement, such as an aptitude test or a height requirement. Because such requirements do not "focus ... on length of employment," California Brewers, 444 U.S. at 610, they "depart significantly from commonly accepted concepts of 'seniority.'" Id. at

609. As the Court recognized in California Brewers, such non-seniority requirements are not protected by § 703(h):

> A collective-bargaining agreement could, for instance, provide that transfers and promotions are to be determined by a mix of seniority and other factors, such as aptitude tests and height requirements. That the "seniority" aspects of such a scheme of transfer and promotion might be covered by § 703(h) does not mean that the aptitude tests or the height requirements would also be so covered.

444 U.S. at 606 n.13.

Moreover, the eligibility requirements imposed by the lines of progression here "distort the operation of the basic system ...." Id. at 610. Under the basic branch seniority system in the present case, nearly 90 percent of the jobs are now open for bidding by all employees and are

awarded to the senior bidder.[59] The top jobs in the lines of progression are excluded from this system.[60] To exercise his or her seniority in bidding on one of these jobs at the top of the pay scale, an employee must first satisfy the non-seniority eligibility requirement. This requirement is not protected by § 703(h). As the Court cautioned in California Brewers, the exception provided by § 703(h) should not

> be given a scope that risks swallowing up Title VII's other-

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59/ In 1973, there were 952 hourly paid non-craft production jobs at the Richmond and Virginia branches combined. Approximately 828 of these jobs, including the bottom jobs in the lines of progression, are subject to the posting and bidding system, under which vacancies are awarded on the basis of branch seniority. (Ex. App. 158-62).

60/ In 1973, there were 121 employees in jobs at the top of the white lines of progression: 120 whites and one black. There were three black employees in jobs at the top of the black lines. (Ex. App. 158-62).

> wise broad prohibition of "practices, procedures and tests" that disproportionately affect members of those groups that the Act protects. Significant freedom must be afforded employers and unions to create differing seniority systems. But that freedom must not be allowed to sweep within the ambit of § 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority. There can be no doubt, for instance, that a threshold requirement for entering a seniority track that took the form of an educational prerequisite would not be part of a "seniority system" within the intendment of § 703(h).

444 U.S. at 608-09.

The courts below found that the line-of-progression requirements here, like the high school education requirement and the aptitude tests in Griggs v. Duke Power Co., are artificial and unnecessary barriers to advancement by black and female

employees. (App. 31-32, 78-80).[61] These barriers are "fair in form, but discriminatory in operation," Griggs, 401 U.S. at 431; they "operate to 'freeze' the status quo of prior discriminatory employment practices." Id. at 430. As the Fourth Circuit recognized in the present case, "[s]ince black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority." (App. 78-79) (emphasis added). Since the lines of progression are not part of any pre-Act or post-Act "seniority sys-

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61/ The district court found that six of the nine lines of progression were not justified by business necessity and perpetuated the job segregation created by the company's and the union's prior intentional discrimination. (App. 31-32). The Fourth Circuit affirmed this finding (App. 78-80), and this Court denied certiorari. (App. 108).

tem" and therefore cannot be protected by § 703(h), they "fall under the Griggs rationale." Teamsters, 431 U.S. at 349. Accordingly, the courts below correctly concluded that the lines of progression violate Title VII.

CONCLUSION

The judgment of the Fourth Circuit *en banc* should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1981

THE AMERICAN TOBACCO COMPANY, ET AL.,
PETITIONERS

v.

JOHN PATTERSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTION PRESENTED

Whether Section 703(h) of the Civil Rights Act of 1964 protected petitioners' decision to adopt racially discriminatory lines of employee progression from a timely challenge.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1199

THE AMERICAN TOBACCO COMPANY, ET AL.,
PETITIONERS

v.

JOHN PATTERSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The en banc decision of the court of appeals (App. 135-184) is reported at 634 F.2d 744. The decision of the panel of the court of appeals (App. 112-134) is reported at 586 F.2d 300. The decision of the district court (App. 109-111) is unofficially reported at 18 Fair Empl. Prac. Cas. (BNA) 371. An earlier decision of the court of appeals (App. 70-107) is reported at 535 F.2d 257. Earlier opinions of the district court (App. 2-49, 50-69) are unofficially reported at 11 Fair Empl. Prac. Cas. (BNA) 577 and 8 Fair Empl. Prac. Cas. (BNA) 778.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1980. The petition for a writ of certiorari was filed on January 16, 1981, and granted on June 15, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission and the private respondents brought these actions, which were consolidated for trial in the United States District Court for the Eastern District of Virginia in 1973. Both suits alleged that petitioners' promotion and seniority practices had confined blacks to low-paid, segregated jobs, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (App. 2-3).[1]

1. Petitioner American Brands, Inc., and its subsidiary, the American Tobacco Company, operate two plants—the "Virginia branch" and the "Richmond branch"—in Richmond, Virginia. Each branch is divided into a prefabrication department, which blends and prepares tobacco for further processing, and a fabrication department, which manufactures the finished product (App. 16, 75). Petitioner Tobacco Workers' International Union and its affiliate, Local 182, are the collective bargaining agents for hourly-paid production workers at both branches (App. 17).[2]

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[1] "App." refers to the Joint Appendix filed in this Court. "J.A." refers to the Joint Appendix filed in the court of appeals. "Exh. App." refers to the Exhibits Appendix filed in the court of appeals.

[2] The international union was named as a defendant only in the private action (App. 3).

Both the company and the union concede that until at least 1963, they engaged in open race discrimination involving every aspect of employment at the two plants—jobs, cafeterias, lockers, and plant entrances (App. 75). Petitioner union maintained two segregated locals; blacks were represented by all-black Local 216, while whites were represented by all-white Local 182 (App. 19). Black employees were assigned to jobs in the "historically black" prefabrication departments and were generally not assigned to jobs in the "historically white" fabrication departments (App. 77, 78, 33). Jobs in the prefabrication departments pay less than jobs in the fabrication departments (App. 33-34). The small proportion of blacks in the fabrication departments generally held manual labor or cleaning jobs (Exh. App. 46-48; App. 33).

Seniority governed layoffs and promotions (App. 75). Under the seniority system maintained by petitioners until 1963, the prefabrication departments each constituted one seniority unit and the fabrication departments constituted separate seniority units (App. 75). Thus an employee could transfer from one of the predominantly black prefabrication departments to one of the predominantly white fabrication departments only by forfeiting his seniority.

In 1963, petitioners came under pressure from government procurement agencies enforcing the anti-discrimination obligations of government contractors (App. 75; J.A. 202). They dropped departmental seniority; instead, employees forfeited seniority only when they transferred between the Richmond branch and the Virginia branch (App. 75).[3] At the same

[3] The union locals were also merged in 1963, with the 350 members of the black local absorbed into the 1400-member white local. None of the officers of the black local retained his position (J.A. 202-203, 247, 500).

time, however, petitioners stopped using seniority alone to determine who would be promoted. Instead, employees had to apply for openings, and the openings were not posted; employees learned of them only by being canvassed by supervisors (App. 76, 28)—virtually all of whom were white.[4] Promotions were then awarded to the most senior "qualified" employee who applied. The company did not maintain written job descriptions; "qualified" meant that an employee "had filled a particular job before and was, in the opinion of supervisory personnel, familiar with it" (App. 28). Between 1963 and 1968, when this promotions policy was in force, virtually all the vacancies in the fabrication departments were filled by white employees. Many of these employees had less plant seniority than blacks (App. 32). The fabrication departments thus remained predominantly white.[5] The district court held that this promotion

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[4] At the Virginia branch, the first black supervisor was appointed in 1963. By 1969, only three of the 71 supervisory employees were black (App. 34). The first black supervisor at the Richmond branch was appointed in 1966, and by 1969 there remained one black supervisor among a total of approximately 30 supervisory employees (App. 35). Between 1963 and 1969 there appear to have been more than 30, and perhaps more than 40, vacancies in supervisory jobs (compare Exh. App. 130-131 with App. 96).

[5] In the Virginia branch there were 82 blacks in the fabrication department in 1963 and 88 in 1968 (Exh. App. 47). The Virginia branch fabrication department appears to have included approximately 660 employees (see Exh. App. 57). In the Richmond branch there were six blacks in 1963 and 12 in 1968 in the fabrication department (Exh. App. 48); that department included approximately 60 employees (see Exh. App. 58). The prefabrication departments, by contrast, were predominantly black (see App. 77-78). Most of the blacks in the fabrication departments continued to hold manual labor or cleaning jobs (Exh. App. 33, 48).

policy was racially discriminatory (App. 8, 32), and the court of appeals agreed (App. 75, 78).

In January 1968, the company began posting vacancies, although it continued not to provide written job descriptions (App. 21, 76). Then, according to the company, on November 14, 1968,[6] it developed and proposed the establishment of nine lines of progression. The union accepted and ratified the lines of progression in 1969 (J.A. 246-247). Six of these lines of progression are at issue before the Court.[7]

Each line of progression consisted of only two jobs. Apparently no employee was eligible for the "top" job in a line until he had worked at least one day in the "bottom" job.[8] According to the company,

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[6] Stipulations of fact adopted by the district court specify that the posting system was instituted on January 15, 1968 (App. 21). The stipulation does not identify the date on which the company proposed the nine lines of progression. In his opening statement at trial, counsel for the company said that "the[ ] lines of progression * * * were finally set up at a meeting in November 1968 * * *" (Tr. 34). Russell Penn Truitt, a member of the company's board of directors and director of manufacturing (Tr. 786, 789), testified at trial that the "lines of progression were established" (J.A. 570) at a meeting that was held on "November 14, 1968" (J.A. 571).

The court of appeals stated that the lines of progression were instituted in January 1968 (App. 143), but the court made no reference to the company's statements, and it was immaterial to the court's holding whether the lines were adopted in January or November of 1968.

[7] The district court held that the others did not violate Title VII (App. 31-32) and respondents do not now challenge this ruling.

[8] Two lines appear to have had alternative bottom jobs. See page 6, note 9 *infra*.

among employees who had worked in the "bottom" job the one with the most seniority within the plant would receive the "top" job (App. 142-143 n.3). Of the six lines at issue here, four consisted of nearly all-white "top" jobs from the fabrication departments linked with nearly all-white "bottom" jobs from the fabrication departments; the other two consisted of all-black "top" jobs from the prefabrication departments linked with all-black "bottom" jobs from the prefabrication departments.[9] The top jobs in the "white" lines of progression were among the best-paying jobs in the plants (Exh. App. 155-163). While it appears that more than two-thirds of the employees in the two plants were in a line of progression,[10] very few of these employees were in the

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[9] The lines of progression at issue here are (App. 21-22, 31-32):

1. Learner-adjuster (top)
   Packing or making machine operator, Schmermund boxer operator (bottom)
2. Examiner-making (top)
   Catcher (bottom)
3. Examiner-packing (top)
   Line searcher—Schmermund boxers (bottom)
4. Turbine operator (top)
   Boiler operator (bottom)
5. Adt dryer operator (top)
   Assistant adt dryer operator (bottom)
6. Textile dryer operator (top)
   Assistant textile dryer operator (bottom)

Both jobs in lines 5 and 6 were in the fabrication departments (Plaintiffs' Exh. 1), and both were all black (Exh. App. 160, 161, 171-172). All jobs in the remaining lines were located in the fabrication department and were nearly all white (Exh. App. 25-37, 46-48, 158-160).

[10] In 1973, 646 of the 952 hoursly-paid workers in the two branches were in the lines of progression. Only five of these employees were in the "black" lines. Exh. App. 158-162.

"black" lines (Exh. App. 158-161). At the Virginia branch, which was only 15% black (App. 34-35), approximately four times as many black employees as white employees were outside the lines of progression entirely. At the Richmond branch, which was one-third black (App. 35), approximately six times as many blacks as whites were outside the lines (see Exh. App. 158-162).

Between 1968, when the lines of progression were instituted, and 1973, when these actions were brought, there were approximately 30 vacancies in top jobs in the "white" lines of progression (Exh. App. 38-47). One of those vacancies was filled by a black; the other 120 top positions continued to be held by whites (see Exh. App. 158-161). The bottom jobs in these lines were also predominantly white, despite numerous vacancies (see Exh. App. 38-47, 158-161). No whites held jobs in the "black" lines (see Exh. App. 160-162). Segregation continued in other respects as well; in the two plants' prefabrication departments, for example, approximately 81% and 92% of the hourly-paid production workers were blacks (App. 19, 77).

2. On January 3, 1969, 50 days after the company proposed the establishment of the lines of progression, three black employees (including one of the private respondents) filed charges with the EEOC, alleging that they had been denied seniority and wage benefits because petitioners discriminated on the basis of race.[11] Copies of these charges were served on pe-

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[11] App. 102, 6-7. Exhs. A-1 to A-20 attached to the Commission's first request for admissions; company's response to the EEOC's first request for admissions.

titioners on February 19, 1969.[12] The Commission found reasonable cause to believe that petitioners' seniority, wage, and job classification practices had discriminatorily restricted blacks to low paying segregated jobs in violation of Title VII. When conciliation efforts failed, the Commission brought this action.[13]

After an extensive trial, the district court held that petitioners' seniority, promotion, and job classification practices violated Title VII (App. 8-9). The court found that petitioners maintained seniority and other employment practices which continued the segregation that had been explicitly enforced until 1963 (App. 32). In particular, the court ruled that the six lines of progression "perpetuated past discrimination on the basis of * * * race" (App. 32), and because petitioners offered no business justification for the six lines, the district court held that they violated Title VII and enjoined the company and union from using them further (App. 31-32, 57).

In 1976, the court of appeals affirmed.[14] It expressly endorsed the district court's finding that "after the effective date of Title VII the company and the union discriminated in the promotional policies

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[12] Exhs. B-1 to B-7 of Commission's first request for admissions; company's response to EEOC's first request for admissions; union's response to EEOC's first request for admissions.

[13] The EEOC also charged petitioners with sex discrimination. The district court upheld this charge (App. 8) and the court of appeals affirmed (App. 74). There is no need to consider the claim of sex discrimination in connection with the lines of progression at issue here.

[14] The court of appeals modified the district court's remedy (see App. 88, 91) in ways that are not relevant here.

of their bargaining agreements" (App. 78). In particular, the court agreed with the trial court that the six lines of progression, the rule requiring employees to forfeit their senority if they transferred between branches, the reliance on the subjective evaluations of white supervisors, and the failure to post written job descriptions all violated Title VII. With respect to jobs in the six lines of progression enjoined by the district court, the court of appeals noted that "[m]ost of these jobs were in the fabrication departments. Since black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority" (App. 78-79). In this respect, the court of appeals ruled, the lines of progression operated "in a manner similar to the [pre-1963] segregated departmental seniority rosters" (App. 79), permitting the company to carry forward segregated employment patterns. This Court denied a petition for a writ of certiorari. See 429 U.S. 920 (1976).

3. In 1977 petitioners moved to vacate the district court's 1974 decree.[15] Petitioners relied primarily on *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 353-354 (1977), which held that Section 703(h) of the Civil Rights Act, 42 U.S.C. 2000e-2(h), exempts certain bona fide seniority systems from the provisions of Title VII. Petitioners argued, among other things, that their seniority systems, including the six lines of progression, were bona fide and therefore not in violation of

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[15] The company and the union did not identify the basis for their motion. The court below treated petitioners' application as a motion under Rule 60(b)(5) of the Federal Rules of Civil Procedure (App. 137 n.1).

Title VII. The district court declined to modify its order, holding that petitioners' "seniority system * * * is not a bona fide system under *Teamsters* * * * because this system operated right up to the day of trial in a discriminatory manner * * * [and] had a discriminatory genesis" (App. 110).

A panel of the court of appeals agreed that "*Teamsters* requires no modification of the relief we approved with regard to job descriptions, lines of progression * * * or supervisory appointments" because those employment practices were not part of a seniority system and therefore did not fall within Section 703(h) (App. 116). The court of appeals then reheard the case en banc and held that "§ 703 (h) * * * has no application to [petitioners'] job lines of progression policy, whether or not it be considered a 'seniority system' * * * [because] [t]his policy was not in effect at American in 1965 when Title VII went into effect" (App. 142-143). The court of appeals concluded that the "legislative history of § 703(h) * * * demonstrates that Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of Title VII's effective date, and * * * to routine post-Act applications of such systems" (App. 143-144). Because the lines of progression were instituted in 1968 and thus did not create any pre-Act expectations, the court of appeals did not disturb the district court's injunction against the six lines of progression.[16]

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[16] The en banc court remanded for a hearing on, among other things, the bona fides of the rule that seniority was forfeited when an employee transferred between branches (App. 145-146, 147-154).

In dissent, Judge Widener, joined by Judge Russell, asserted that the lines of progression were established before the

SUMMARY OF ARGUMENT

I. The court of appeals' judgment is correct, but in our view its rationale is too broad. The court overlooked the distinction between the decision to *adopt* an aspect of a seniority system and the subsequent employment decisions made in *implementing* the system. Unlike the court of appeals, we believe that Section 703(h) protects applications of a seniority system even if the system, or the challenged aspect of the system, was instituted after the effective date of Title VII.

Respondents, however, filed a timely challenge to the adoption of petitioners' lines of progression. Section 703(h) does not immunize the decision to adopt an aspect of a seniority system, when that decision is properly challenged. By interpreting Section 703(h) to protect the application of a seniority system but not the decision to adopt an aspect of a seniority system, the Court can give full force to the language and policies of that Section without undermining the central purpose of Title VII—something Section 703(h) was never intended to do.

1. When petitioners instituted the lines of progression, they established a new qualification for the "top" jobs; no matter how senior he might be, an employee seeking a "top" job had to have served in a "bottom" job. Because the "bottom" jobs in the most desirable lines of progression had been deliberately reserved to whites, the decision to adopt the lines of progression "operate[d] to 'freeze' the status quo of prior discriminatory employment practices" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430

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effective date of Title VII (App. 161-177) and that Section 703(h) immunizes the post-Act establishment of seniority systems in any event (see App. 160 n.1).

(1971)), ensuring that virtually no blacks would be promoted to "top" jobs. Moreover, the lines of progression now at issue were not justified by a business necessity. It follows that permitting the lines of progression to be instituted would have been inconsistent with a central prohibition of Title VII—that employers and unions may not "limit * * * or classify" employees "in any way which would deprive or tend to deprive any individual of employment opportunities * * * because of * * * race" (42 U.S.C. 2000e-2(a)(2)).

2. At the same time, neither the language nor the purposes of Section 703(h) require that the decision to adopt the lines of progression be immunized. Although the distinction between adopting and implementing a provision of a collective bargaining agreement was established under the National Labor Relations Act, on which Title VII was modeled, Congress drafted Section 703(h) to protect only employment decisions made "pursuant to" a seniority system; the language of Section 703(h) does not cover the decision to adopt an aspect of a seniority system. The legislative history demonstrates that the principal purpose of Section 703(h) was to protect employees' seniority "rights"—that is, the expectations employees acquire on account of having worked for a period of time under a seniority system. A timely challenge to the decision to adopt a new aspect of a seniority system, such as respondents' challenge to petitioners' decision to institute the lines of progression, in no way threatens these expectations, for it occurs before legitimate expectations can develop. Indeed, it was the decision to adopt the lines of progression which prevented employees from using their seniority "rights" to obtain top jobs; in this way, respondents' challenge to the lines of progression

actually vindicated expectations based on the seniority system.

Petitioners assert that unless they are free to adopt such measures as the lines of progression policy without regard to the prohibitions of Title VII, they will be unable to adapt to changing circumstances. But the courts below did not impose any extraordinary limitation on petitioners. They merely required that petitioners justify the additional employment qualifications imposed by the lines of progression policy in the same way they would justify any other employment qualifications that served the same purpose of filling jobs with properly trained and experienced employees. Because employees had developed no expectations in the continued operation of the lines of progression policy, the circumstance that that policy was part of a seniority system should not excuse petitioners from having to show that the lines are not an artificial and unnecessary barrier to employment with a discriminatory effect on blacks.

There is, to be sure, substantial basis for concluding that Congress considered it inappropriate to require employers and unions to show a business necessity for using the seniority principle to reconcile members' conflicting interests and otherwise to organize the workplace. But the lines of progression at issue here do not serve any of these functions; rather, as petitioners acknowledge, they qualify the use of seniority in order to serve the same management needs as other employment practices that would undoubtedly be subject to the prohibitions of Title VII. There is, therefore, no reason to exempt the decision to adopt the lines of progression from those prohibitions.

II. The Court may also affirm the judgment of the court of appeals on the alternative ground that

the lines of progression policy is not bona fide and therefore not within Section 703(h). The district court, on the basis of its extensive familiarity with the case, held that the lines of progression policy was not bona fide; this holding was not questioned by the court of appeals and is strongly supported by the record.

Petitioners maintained explicit segregation until at least 1963. Under pressure from government agencies, they then modified their promotion practices, ostensibly giving black employees the opportunity to obtain jobs previously reserved for whites; but the new system they adopted depended heavily on the standardless, subjective evaluations of white supervisors. Consequently, the jobs previously reserved to whites continued to be held by whites. The district court and the court of appeals held that this promotion practice was racially discriminatory.

In 1968, petitioners, again under pressure from the government, shifted to the lines of progression policy. This policy had the predictable effect of continuing the same segregated employment patterns that had previously existed, essentially excluding blacks from the better jobs. In view of both the company's and the union's previous explicit commitment to segregation, and their previous choice of practices that would continue segregation in effect, there is a substantial basis for inferring that petitioners adopted the lines of progression practice at least in part because it would continue the segregated employment patterns.

Moreover, petitioners were unable to identify the business purposes served by the six lines of progression at issue here—despite having an opportunity, and every incentive, to do so at the first trial. Because the lines did not serve a business purpose, and

did serve an objective the company and union had long and persistently pursued—reserving the best jobs for whites—the district court was justified in concluding that the latter objective at least partially motivated the decision to adopt the lines of progression, rendering them not bona fide.

ARGUMENT

I. SECTION 703(h) DOES NOT BAR A TIMELY CHALLENGE TO THE POST-ACT ADOPTION OF AN ASPECT OF A SENIORITY SYSTEM

A. This Case Presents a Challenge to the Adoption, Not the Operation, of the Lines of Progression

1. While the judgment of the court of appeals was correct, its rationale, in our view, is too broad. Specifically, the court of appeals overlooked the distinction between a challenge to the *adoption* of a seniority system and a challenge to the system's *operation*. Contrary to the court of appeals, we believe that Section 703(h) applies to a challenge to the operation of an aspect of a seniority system, even if that aspect was instituted after the effective date of Title VII. But Section 703(h) should not apply to a timely challenge to the post-Act adoption of an aspect of a seniority system.

Respondents' claim is properly seen as a challenge to the adoption, not the operation, of the lines of progression. The company asserted that the lines were adopted on November 14, 1968, and the private respondents filed a charge with the EEOC before the statutory charging period elapsed.[17] Until the

[17] Respondents filed their charge within 50 days. At the time the private respondents filed their charge, Title VII generally required charges to be filed within 90 days of an alleged violation. 78 Stat. 260. Section 706(e), added in 1972,

district court enjoined their operation, the lines were applied in making various employment decisions, but those applications merely furnished additional evidence in support of the claim that the decision to institute the lines violated Title VII.

If respondents had not filed a timely challenge to the adoption of the lines of progression, and had instead challenged only subsequent promotion decisions made pursuant to the lines of progression policy, Section 703(h) would, in our view, apply to their claim. Such a claim could succeed only if the lines of progression were not part of a seniority system [18] or were not bona fide, even though the lines were adopted after the effective date of Title VII. But to interpret Section 703(h) to bar a timely challenge to the adoption of the lines of progression would thwart the basic purpose of Title VII without any sufficient justification in the language of Section 703(h) or the policies underlying that Section. Because respondents made a timely challenge to the

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now generally requires aggrieved persons to file a charge with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e). See generally *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980). This period should also apply here, because the private respondents' charge was pending with the EEOC on March 24, 1972, the effective date of the 1972 amendment. See, *e.g.*, *Hunter* v. *Westinghouse Electric Corp.*, 616 F.2d 267 (6th Cir. 1980). See also *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 241-243 (1976).

[18] In our view, the court of appeals panel was correct in its conclusion that the lines of progression policy was not an aspect of petitioners' seniority system. See pages 35-37, note 31 *infra*. Throughout this discussion, however, we shall, like the en banc court of appeals, assume arguendo that the lines of progression are part of a "seniority * * * system" within the meaning of Section 703(h).

adoption of the lines of progression, Section 703(h) does not require modifying the district court's injunction against the use of the lines.

2. By adopting the lines of progression, petitioners instituted a new qualification that had to be met by employees seeking one of the high paying "top" jobs formerly confined to whites. Irrespective of his seniority, and whatever his other qualifications, an employee had to have served in one of the "bottom" jobs. Because the "bottom" jobs were historically confined to whites as well, the new qualification imposed by the lines of progression predictably "operate[d] to 'freeze' the status quo of prior discriminatory employment practices" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971)); practically no blacks were promoted to the "top" jobs. This new qualification was "not justified by any business necessity" (App. 31-32).

These facts were found by the district court in 1974 and affirmed by the court of appeals in 1976, and petitioners do not appear to take issue with them here. It is a central policy of Title VII—" 'a policy that Congress considered of the highest priority' " (*Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978), quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); see *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763 (1976))—that an employer or union may not impose job qualifications which perpetuate the effects of past discrimination without serving a busines necessity. See *Dothard* v. *Rawlinson*, 433 U.S. 321, 328-332 (1977); *Griggs* v. *Duke Power Co.*, *supra*.

Petitioners nonetheless assert that they should be allowed to reinstate the additional qualification imposed by the lines of progression policy. In particular, they claim that the lines of progression are

an aspect of a seniority system and are therefore protected by Section 703(h). But the language of Section 703(h) does not compel the result petitioners seek; moreover, no purpose of Section 703(h) would be served—and the central purpose of Title VII would be disserved—by permitting this result. Congress enacted Section 703(h) not to "narrow [the] application of * * * [T]itle [VII]" or undermine its basic objectives but only to "clarif[y] its * * * intent and effect." 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey); see *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 352 (1977). Here Section 703(h) can be fully reconciled with the central purposes of Title VII by sustaining our challenge to the adoption of the lines of progression while not endorsing the court of appeals' more far-reaching assertions that Section 703(h) is inapplicable to the operation of any aspect of a seniority system if that aspect was instituted after the effective date of Title VII.[19]

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[19] If a seniority system is not bona fide, then not only its adoption but its application is unprotected by Section 703(h). See, *e.g.*, *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 353; *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364, 1378 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978). The application of such a discriminatory system is a continuing violation which may be challenged as long as the violation persists. See *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 560 (1977). See also *Delaware State College* v. *Ricks*, 449 U.S. 250, 256-257 (1980); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 473 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978). But if a seniority system is bona fide, then in our view Section 703(h) protects the application of the system, even if the system was instituted after the effective date of Title VII. In other words, because of Section 703(h), the application of a bona fide seniority system is not a continuing violation.

B. By Its Terms, Section 703(h) Does Not Exempt the Decision to Adopt an Aspect of a Seniority System from Title VII

1. Under the terms of Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2), petitioners' adoption of the lines of progression was clearly an unlawful employment practice. That section makes it illegal for an employer "to limit * * * or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race * * *." Section 703(c)(2), 42 U.S.C. 2000e-2(c)(2), applies essentially the same prohibition to unions. See also 42 U.S.C. 2000e-2(c)(3). Petitioners restricted eligibility for top jobs to those employees who had held the bottom jobs; in this way they "limit[ed]" employees and "classif[ied]" them in ways that directly "deprive[d] [and] tend[ed] to deprive" many of them of certain "employment opportunities." Because petitioners' decision to limit and classify employees in this way gave effect to past intentional discrimination, and served no business necessity, it was racially discriminatory under *Griggs* v. *Duke Power Co.*, *supra*.[20] See *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 141-143 (1977).

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[20] It is very likely that at the time the private respondents challenged the adoption of the lines of progression policy, that policy only limited their prospects and had not yet had a concrete effect on their wages or conditions of employment. But this did not bar their claim. Section 703(a)(2) refers to "classif[ications]" or "limit[ations]" which affect employment "opportunities"; it is not confined to employment practices or decisions which immediately affect wages or other specific benefits. "[T]he proper focus is on the * * * *discriminatory act*, not the point at which the *consequences* of the act become painful." *Chardon* v. *Fernandez*, No. 81-249 (Nov. 2, 1981) slip op. 2 (emphasis in original). Thus, for example, an

2. By contrast, the terms of the Section 703(h) exemption do not cover petitioners' decision to adopt the lines of progression. Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority * * * system * * *." This language addresses only decisions made "pursuant to" a seniority system; here, it would cover, at most, a decision not to promote a particular employee to a top job because he had not worked in a bottom job. The decision to adopt a senority system is, plainly, not a decision made "pursuant to" that system. See generally *Old Colony Trust Co.* v. *Commissioner*, 301 U.S. 379, 383 (1937). Moreover, in order to challenge the decision to adopt the lines of progression, we need not claim that petitioners were "apply[ing] different standards of compensation, or different terms [and] conditions * * * of employment"; under Section 703(a)(2), it suffices that the lines of progression policy classified and limited employees in a way that adversely affected their opportunities.

Congress could have drafted Section 703(h) to refer to decisions to adopt a seniority system, had it

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employee can—and sometimes must—challenge a decision denying him tenure even while he continues to work for his employer. See *Delaware State College* v. *Ricks*, *supra*. Similarly, active employees may challenge a discriminatory retirement plan. See, *e.g.*, *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1188-1189 (7th Cir. 1971). See also *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90, 94 (3d Cir. 1973). In any event, the adoption of a seniority system in a collective bargaining agreement binds employees in the bargaining unit, and in that sense has an immediate impact on them. See generally *Emporium Capwell Co.* v. *Western Addition Community Association*, 420 U.S. 50 (1975).

wished to do so. The National Labor Relations Act was the model for much of Title VII (see, *e.g.*, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 & n.11 420 & n.12 (1975)),[21] and the NLRA distinguisnes between the adoption of an unlawful term in a collective bargaining agreement and its subsequent implementation; the Court has held that the adoption may be an unfair labor practice, challengeable only within the statutory charging period, while its implementation is not. See *Local Lodge No. 1424, International Association of Machinists* v. *NLRB*, 362 U.S. 411 (1960). Moreover, members of Congress pointed out that the language of Section 703(a)(2) referring to the "limit[ing]" and "classify[ing]" of employees would cover seniority systems (see, *e.g.*, 110 Cong. Rec. 2726 (1964) (remarks of Rep. Dowdy)), but Congress did not extend Section 703(h) to "limitations" and "classifications"—only to differences in employment conditions that were the result of the application of seniority systems.[22]

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[21] See also 110 Cong. Rec. 7266-7267 (1964) (remarks of Sen. Ellender); EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 7-9 (1964); Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 431 & n.2 (1966).

[22] By its terms Section 703(h) applies only to employers, not to unions. In practice, Section 703(h) can operate to immunize unions as well; for example, Section 703(c)(3) makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section," so union involvement in a practice protected by Section 703(h) cannot by itself give rise to liability under Section 703(c)(3).

But it is nonetheless significant that Congress referred only to employers in drafting Section 703(h). The application of a seniority system, especially insofar as it affects terms and

Thus while Section 703(h) exempts actions taken in implementing a seniority system, nothing in Section 703(h) refers to the adoption or institution of a seniority system. Petitioners themselves emphasize (*e.g.*, Union Br. 11) Senator Dirksen's statement that the language of Title VII "received meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase" (110 Cong. Rec. 11935 (1964)). For these reasons, the only conclusion to be drawn from the language is that "the unmistakable purpose of § 703(h) [is] to make clear that the routine *application* of a bona fide seniority system would not be unlawful under Title VII." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 352 (1977) (emphasis added).

C. Immunizing the Decision to Adopt an Aspect of a Seniority System from Timely Challenge Would Not Serve the Purposes of Section 703(h) and Would Thwart the Central Purposes of Title VII

1. The distinction between the adoption and the application of an aspect of a seniority system reflects important congressional policies. The legislative history shows that the central purpose of Section 703(h) was not to ensure that employees and unions could design and adopt whatever sort of seniority system they desired; rather, Section 703(h) was intended to protect the expectations employees acquired in the continued operation of a seniority system. In other words, Section 703(h) rests on a "congressional judg-

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conditions of employment, is the responsibility of the employer. By contrast, the decision to adopt a seniority system, or a particular aspect of it, is jointly made by the employer and the union. Thus Congress's reference to employers alone is further evidence that Section 703(h) was intended to cover only the application, not the adoption, of a seniority system.

ment * * * that Title VII should not * * * destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 353. A timely challenge to the adoption of a seniority system does not endanger this congressional policy, for it occurs before such expectations can develop.

Section 703(h) was added to the Civil Rights Act in response to criticism by opponents of the Act. See *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 352.[23] Those opponents repeatedly argued that "Title VII would undermine the vested rights of seniority" (110 Cong. Rec. 7206 (1964) (statement of Sen. Clark, quoting Sen. Hill)). The minority report of the House Committee that favorably reported the bill became the Civil Rights Act charged that Title VII would "seriously im-

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[23] Section 703(h) was not part of the bill passed by the House, H.R. 7152, 88th Cong., 2d Sess. (1964). See 110 Cong. Rec. 2804 (1964); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 759 (1976). That bill was sent directly to the Senate floor where it was filibustered; Senators Mansfield and Dirksen eventually submitted a substitute bill that broke the filibuster. See Vaas, *Title VII: Legislative History*, *supra*, 7 B.C. Indus. & Com. L. Rev. at 445. Section 703(h) first appeared as part of this substitute bill. 110 Cong. Rec. 11931 (1964). Senator Humphrey, one of the drafters of the substitute, explained that Section 703(h) did not alter the meaning of Title VII but "merely clarifie[d] its present intent and effect." 110 Cong. Rec. 12723 (1964); see *Franks* v. *Bowman Transportation Co.*, *supra*, 429 U.S. at 761. Thus, as petitioners implicitly acknowledge, statements of House proponents of Title VII about its effects on seniority, and statements made by Senate proponents before Section 703(h) was proposed, are evidence of the meaning of Section 703(h).

pair * * * [t]he seniority rights of employees in corporate and other employment * * *." H.R. Rep. No. 914, 88th Cong., 1st Sess. 64-65 (1963). Another opponent argued that under Title VII "benefits which organized labor has attained through the years would no longer be matters of 'right' * * *." 110 Cong. Rec. 486 (1964). Title VII, opponents charged, would "*destroy union seniority*" which was a "most valuable asset" (H.R. Rep. No. 914, *supra*, at 71; emphasis in original) and would undermine "established seniority" (110 Cong. Rec. 2726 (1964)). Opponents of Title VII outside Congress claimed that it would "place[] in jeopardy" the "seniority rights of union members." See 110 Cong. Rec. 9111 (1964).

The bill's defenders answered these charges in the same vein; they focused on employees' expectations about the continued operation of seniority systems. Thus the bill's supporters accused their opponents of attempting to "put [people] in fear about * * * seniority" by falsely suggesting that under Title VII "seniority systems would be abrogated and * * * white men's jobs would be taken and turned over to [blacks]." 110 Cong. Rec. 11471 (1964). This was "a cruel hoax * * * [that] generates unwarranted fear among those individuals who must rely upon their job or union membership to maintain their existence." 110 Cong. Rec. 9113 (1964). The chairman of the House committee that reported the bill said: "It has been asserted * * * that the bill would destroy * * * employee rights vis-a-vis the union and the employer. This again is wrong." 110 Cong. Rec. 1518 (1964) (statement of Rep. Celler). Other House proponents explained that "[T]itle VII * * * does not permit interferences with seniority rights of employees or union members." 110 Cong. Rec. 6566 (1964). The Senate managers, Senators Humphrey

and Kuchel, explained that "[t]he full rights * * * of union membership * * * will in no way be impaired" (110 Cong. Rec. 6549 (1964) (Sen. Humphrey)) and that "seniority rights [would not] be affected by this act" (110 Cong. Rec. 6564 (1964) (Sen. Kuchel)).

Perhaps the most "authoritative indicators of [the] * * * purpose [of Section 703(h)]" (*International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 352) are memoranda submitted during the Senate debate by Senators Clark and Case. The theme of those memoranda was that Title VII would not interfere with seniority "rights" or expectations based on seniority systems already established and in operation (110 Cong. Rec. 7207, 7213 (1964)):

> [I]t has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect.
>
> * * * * *
>
> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective.

Thus it seems clear that the principal purpose of Section 703(h) was to make explicit Congress's intention not to "destroy" the "rights" that employees acquired under seniority systems. That is, Title VII was not to interfere with employees' expectations that a seniority system, once lawfully instituted, would continue to operate.

This conclusion is subject to two qualifications. First, as we will explain (pages 30-31, *infra*), it cannot fairly be said that this was the only purpose of Section 703(h); Congress also recognized the important role that seniority plays in collective bargaining, and its historic importance to workers. Second,

while Section 703(h) did protect employees' seniority expectations to some degree, it did not insulate those expectations entirely from adjustment. It is well established, for example, that a violation of Title VII may be remedied by an "award of the seniority credit [a victim of discrimniation] presumptively would have earned but for the wrongful treatment" even if "such relief diminishes the expectations of other, arguably innocent, employees * * *." *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 767, 774.

Nonetheless, the legislative history shows that in passing Section 703(h) Congress's primary concern was with employees' expectations under seniority systems that were in operation. A timely challenge to the adoption of an aspect of a seniority system—such as respondents' challenge to the lines of progression—in no way impairs these expectations. Respondents challenged the lines of progression soon after they were established.[24] Petitioners were notified of

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[24] Judge Widener, dissenting from the en banc decision of the court of appeals, argued that the lines of progression were adopted before 1965. But Judge Widener made no reference to the company's explicit statement that the lines of progression were "set up" and "established" on November 14, 1968. See page 10, note 16 *supra*. In any event, Judge Widener's argument was simply that between 1963 and 1968, when company supervisors were using their discretion to decide whether an applicant for a job was "qualified," they would consider, together with a variety of other factors, the applicant's experience in other jobs in the plant (App. 162, 169). This cannot be enough to show that there were defined lines of progression that were an aspect of a seniority system. See *California Brewers Association* v. *Bryant*, 444 U.S. 598, 609-610 (1980) ("[A] standard that gives effect to subjectivity" "depart[s] significantly from commonly accepted concepts of

the challenge within six weeks.[25] Thus employees could not have justifiably relied on the continued existence of the lines of progression and developed legitimate expectations based on the lines.[26] See *Oc-*

'seniority.' "). If Judge Widener's approach were correct, an employer could extend Section 703(h) immunity to any criterion simply by showing that it had previously entered into discretionary employment decisions in some way.

[25] Under Section 706(b) of Title VII (42 U.S.C. 2000e-5(b)), added in 1972, notification of a charge must be served on the employer and union within 10 days of its receipt by the EEOC. Before 1972, the EEOC was only required to serve notice within a reasonable time. See *Chromocraft Corp.* v. *EEOC*, 465 F.2d 745 (5th Cir. 1972).

[26] Some expectations based on the lines of progression may, of course, have arisen between the challenge and the conclusion of the litigation. But this is an unavoidable risk; until the litigation runs its course, timely notification of the challenge to the lines of progression is the only possible means of preventing employees from acquiring unjustified expectations. The Court has held that Congress relied on such notification to ensure that litigation delays would not be unfair. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 372-373 (1977).

Moreover, Congress intended the EEOC to delay initiating litigation until it had investigated the charge and attempted conciliation. See *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 359-360, 368. Voluntary settlement and conciliation are "the preferred means" of resolving employment discrimination claims (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); see *Carson* v. *American Brands, Inc.*, No. 79-1236 (Feb. 25, 1981), slip op. 8 n.14), and a principal objective of Title VII is to " 'spur * * * employers and unions to self-examine and to self-evaluate their employment practices * * *.' " *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975), quoting *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973). Had petitioners done so, or had they been willing to conciliate with the

cidental Life Insurance Co. v. *EEOC*, 432 U.S. 355, 371-372 (1977).

In fact, when the lines of progression were established they interposed additional qualifications which had to be met by employees seeking to use their seniority to obtain a better job. Before the lines were instituted, employees with plant seniority could look forward to obtaining one of the top jobs; when the lines of progression were adopted, employees—black and white alike—found that less senior employees who had served in bottom jobs would obtain the top jobs instead. In this way, the decision to adopt lines of progression frustrated existing seniority expectations. Respondents' challenge to that decision actually helped restore previously existing expectations. Thus once respondents' claim is seen as a challenge to the adoption, not the operation, of the lines of progression policy, there is no basis for suggesting that it is inconsistent with the purpose of Section 703(h).

2. Petitioners assert (*e.g.*, Union Br. 31; Company Br. 30, 32) that unless Section 703(h) is interpreted to permit them to reinstate the lines of progression, their ability to determine who should be

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respondents, no unwarranted expectations would have developed.

In any event, the danger that employees acquired unwarranted expectations in the continued operation of petitioners' lines of progression is far less than the danger that a seniority system that is not bona fide will create such expectations, since such a system may operate for years without being challenged; yet Congress clearly intended to permit challenges to aspects of seniority systems that were not bona fide. Moreover, courts retain the power to shape seniority relief in a way that avoids inequity. See *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 770.

promoted—and otherwise to alter plant operations in response to changing circumstances—will be excessively and unjustifiably restricted. But the courts below did not impose any extraordinary or unprecedented limitation on petitioners.

Petitioners' lines of progression policy specifies that, as an additional prerequisite or qualification for holding a "top" job, an employee must have held the designated "bottom" job. The effect of denying petitioners the benefit of Section 703(h) was only to require that they justify this policy in the same way they would justify any other employment qualification—by showing, under *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431, that that qualification is not an "artificial, arbitrary, and unnecessary barrier[] to employment * * * which operates to exclude [blacks and] cannot be shown to be related to job performance."

For example, in order to serve the same purposes as the lines of progression policy, petitioners might have specified that as a prerequisite to obtaining certain jobs an employee must have experience in a designated job *outside* the company, or must have completed a training program, or must demonstrate certain aptitudes, or must have a vocational school diploma. All of these requirements would be subject to *Griggs*. See, *e.g.*, *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 221-222 (5th Cir. 1974) (high school diploma); *United States* v. *Hayes International Corp.*, 456 F.2d 112, 118 (5th Cir. 1972) (prior experience). Petitioners do not explain why it is unreasonable, or in conflict with a purpose of Title VII or Section 703(h), to require the same justification for the employment qualifications established by the lines of progression policy.

It is not a sufficient answer that the lines of progression policy is an aspect of a seniority system.

We can discern only two reasons Congress might have had for requiring a weaker justification for an employment practice that is an aspect of a seniority system, and neither of those reasons is applicable here.

First, as we have explained, Congress did not want Title VII to "destroy or water down the vested seniority rights of employees simply because * * * [the] seniority system * * * perpetuate[d] [past] discrimination." *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 353. Congress may have been concerned about the employee who worked for years in a bottom job with the expectation that by doing so he would improve his chances of obtaining a top job. But, as we have said, this concern is not material here, for petitioners' lines of progression were challenged when they were adopted, before any such expectations could develop.

The second possible reason for requiring a lesser justification for an aspect of a seniority system is that the seniority principle—'that preferential treatment is dispensed on the basis of some measure of time served in employment" (*California Brewers Association* v. *Bryant*, *supra*, 444 U.S. at 606) and that "longevity with an employer" is "reward[ed]" (*Alabama Power Co.* v. *Davis*, 431 U.S. 581, 589 (1977))—is of "overriding importance" in collective bargaining and in the organization of the workplace. *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964); see *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 79 (1977); Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962). In considering Title VII and Section 703(h), Congress recognized that unions almost universally use seniority to allocate scarce benefits among their members. See, *e.g.*, H.R. Rep.

No. 914, *supra*, at 71. The seniority principle is thus often vital to a union's efforts to aggregate and reconcile the conflicting interests of those it represents (see, *e.g.*, Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1604 (1969))—a central aspect of a union's role under the federal labor laws. See *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338-339 (1953).

Accordingly, Congress may well have believed that to require a union to show that seniority serves a business necessity would undermine one of the central institutions of collective bargaining. Specifically, the business necessity requirement is not well suited to justifying the use of the seniority principle itself—that is, length of service—as a criterion. See generally *Jersey Central Power & Light Co.* v. *Local 327, IBEW*, 508 F.2d 687, 705-710 (3d Cir. 1975). The principal justification for using seniority as a criterion lies in tradition, and in employees' general willingness to accept it as a fair basis for allocating scarce benefits. See, *e.g.*, Cooper & Sobol, *supra*, 82 Harv. L. Rev. at 1604-1605.

This case, however, does not concern a union's role in reconciling employees' conflicting interests by using a measure that is generally accepted as legitimate; nor does it involve dispensing preferential treatment "on the basis of * * * time served in employment," *California Brewers Association* v. *Bryant*, *supra*, 444 U.S. at 606. The lines of progression are a constraint that was imposed on the use of seniority in order to serve management objectives. Petitioners virtually concede as much, arguing that the "narrow-[ing]" of seniority by such means as the lines of progression policy is needed to achieve management's

goal of promoting the more qualified employees (see Union Br. 30; Company Br. 28-29); it is in any event obvious that any justification for the lines of progression must invoke management's needs for qualified employees, not the union's interests.

We know of nothing suggesting that Section 703(h) was intended to allow a policy that limits the use of seniority in order to serve the same management objectives as other employment qualifications to be justified more easily than other qualifications.[27] Indeed, it is fair to say that in enacting Section 703(h) Congress was almost exclusively concerned with the importance of seniority to unions and employees, and scarcely mentioned employers' interests in incorporating rules into seniority systems. See, *e.g.*, 110 Cong. Rec. 6549, 6553-6554, 11486, 11768, 11848 (1964); H.R. Rep. No. 914, *supra*, at 71.

We recognize, of course, that "[s]eniority systems, reflecting as they do, not only the give and take of

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[27] The legislative history includes such statements as "nothing in the bill would affect any seniority plan which was not a cloak for racial or religious discrimination" (110 Cong. Rec. 5423 (1964) (remarks of Sen. Humphrey), quoted at Union Br. 16), but it is clear that by "discrimination" the proponents of the Act meant the sort of discrimination outlawed by *Griggs*. For example, in the same speech in which he made the statement just quoted, Senator Humphrey said that the bill "does not limit the employer's freedom to hire, fire, promote, or demote for any reason * * *—so long as his action is not based on race" (110 Cong. Rec. 5423 (1964)). Indeed, the proponents of the Act often linked management practices to seniority systems, explaining that both would be unlawful if discriminatory and lawful if nondiscriminatory. See, *e.g.*, 110 Cong. Rec. 5094 (1964) ("An employer will remain wholly free to hire on the basis of his needs and of the job candidate's qualifications. What is prohibited is the refusal to hire someone because of his race or religion. Similarly, the law will have no effect on union seniority rights.").

free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes," and that "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems" (*California Brewers Association* v. *Bryant*, 444 U.S. 598, 608 (1980)). When employees have developed expectations based on "those components of [a] * * * seniority scheme that, viewed in isolation, [do not] embody or effectuate the principle that length of employment will be rewarded," there is good reason to "exempt [those components] from the normal operation of Title VII * * *." *Id.* at 607. Thus to the extent that petitioners' lines of progression are bona fide, and are an aspect of their seniority system, the "routine application" (*International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 352) of the lines of progression will be protected by Section 703(h), because those lines of progression may have given rise to employees' expectations. Moreover, even when the adoption of a seniority system is challenged, there may be aspects of the system—notably the very use of the seniority principle—to which it would be inappropriate to apply the "business necessity" requirement as it has been developed in other contexts.

Here, however, respondents have challenged the adoption of an aspect of a seniority system that resembles any other job qualification and that gave rise to no legitimate expectations. If the six challenged lines of progression are "related to job performance" (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431), petitioners should be able to show that they are—just as they were able to show that the other three lines served a business necessity (App. 31-32). See *Furnco*

Construction Corp. v. *Waters*, 438 U.S. 567, 577 (1978). But there is no reason to allow employees and unions to adopt "artificial, arbitrary, and unnecessary barriers to employment" (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431) merely because those barriers "have some nexus to an arrangement that concededly operates on the basis of seniority" (*California Brewers Association* v. *Bryant*, *supra*, 444 U.S. at 608).

3. Petitioners (*e.g.*, Union Br. 28-31; Company Br. 27-31) and amicus (Am. Br. 15, 20 n.18)[28] also argue that unless the lines of progression are immunized from Title VII, employers and unions will be unable to adopt any change in their seniority practices, even a change that would favor minorities, for fear that the entire seniority system will then be challenged as not being sufficiently favorable to minorities (see, *e.g.*, Union Br. 18). Neither we nor the court of appeals suggests that the addition of a single feature—such as the lines of progression—to a seniority system deprives every other aspect of that system of the protection of Section 703(h). The court of appeals carefully distinguished between the lines of progression policy, which it held was not covered by Section 703(h), and the rule providing that an employee forfeited his seniority when he transferred between branches—a rule which the court specifically held was protected by Section 703(h) and therefore was lawful unless not bona fide. App. 142, 145. A challenge to the adoption of an aspect of a seniority system draws into question only that aspect, not other features that were adopted long before. See *California Brewers Association* v. *Bryant*, *supra*, 444

[28] "Am. Br." refers to the brief of Amicus Curiae Equal Employment Advisory Council.

U.S. at 610-611.[29] Similarly, if an aspect of a seniority system is changed, the question raised by a timely challenge to the change is whether that change violates Title VII; the change would not make the entire system liable to reexamination.[30]

II. PETITIONERS' LINES OF PROGRESSION ARE NOT A BONA FIDE ASPECT OF A SENIORITY SYSTEM

Section 703(h) "does not immunize all seniority systems. It refers only to 'bona fide' systems * * *." *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 353. Thus if petitioners' six lines of progression are not a bona fide aspect of their seniority system, the district court was correct in refusing to modify its original injunction against the lines.[31]

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[29] See Brief for the United States and the EEOC as amici curiae in *Pullman-Standard* v. *Swint* and *United Steelworkers of America* v. *Swint*, Nos. 80-1190 and 80-1193, at 9-10. A copy of this brief has been sent to counsel for the other parties.

[30] Moreover, Section 703(h) does not even become relevant unless a properly challenged aspect of a seniority system has a disproportionately harmful effect on minorities. If a new aspect of a seniority system, or a change in that system, has the effect of favoring minorities in order to overcome prior discrimination, that new aspect does not violate the substantive prohibitions of Title VII even if it is not justified by a business necessity. There is thus no basis for petitioners' suggestion that the Section 703(h) exemption is needed to protect the efforts of employers to modify their employment practices so as to overcome prior discrimination; such efforts are protected because they are not proscribed by any provision of Title VII. See *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979).

[31] We also agree with the court of appeals panel that the lines of progression policy was not an aspect of a seniority system, and is not within Section 703(h) for that reason as

The district court held that the lines of progression were not bona fide. Although they decided the case on different grounds, the court of appeals panel

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well. The lines of progression policy did not establish units within which seniority was calculated; the seniority units were the two branches, and the amount of time an employee had spent in a line of progression was irrelevant to his seniority. In this respect the lines of progression policy was unlike the distinction between city and over-the-road drivers involved in *International Brotherhood of Teamsters* v. *United States*, *supra*; unlike the distinction between temporary and permanent employees at issue in *California Brewers Association* v. *Bryant*, *supra*, 444 U.S. at 609; and apparently unlike the usual line of progression seniority scheme (see, *e.g.*, *United States* v. *Georgia Power Co.*, 634 F.2d 929, 931 (5th Cir. 1981), petition for cert. pending *sub nom. Local 84, IBEW* v. *United States*, No. 80-2117; Cooper & Sobol, *supra*, 82 Harv. L. Rev. at 1602).

Similarly, the lines of progression policy does not "delineate how and when the seniority time-clock begins ticking, * * * specify how and when a particular person's seniority may be forfeited, * * * [or] define which passages of time will 'count' towards the accrual of seniority and which will not." *California Brewers Association* v. *Bryant*, *supra*, 444 U.S. at 607 (footnotes omitted). Nor does it "particularize the types of employment conditions," such as "vacation time * * * job security in the event of layoffs, * * * promotions or job assignments" that "will be governed or influenced by seniority." *Ibid.* & n.20.

Moreover, the lines of progression policy, again unlike the distinction at issue in *California Brewers Association*, does not "focus[] on length of employment" (444 U.S. at 610). Apparently one day's service in a bottom job was as much benefit to an employee as 40 years' service. The only thing distinguishing the lines of progression from, for example, an "educational prerequisite"—which clearly cannot be an aspect of a seniority system (see *id.* at 609)—is that the qualifications required by the lines of progression policy could be obtained only by working in petitioners' plant. But this alone cannot justify treating a rule as an aspect of a seniority system; many other criteria, clearly not aspects of a seniority

and the en banc court of appeals did not question this holding. The district judge had presided over a lengthy trial at which the genesis and impact of the lines of progression, and the possible business justifications for them, were thoroughly explored. Because of the district judge's familiarity with the case, his conclusion that the lines of progression were not bona fide is entitled to some deference. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 535 n.8 (1979). Moreover, the record strongly supports the conclusion reached by the district judge. In these circumstances, the Court may wish to affirm the judgment of the court of appeals on the alternative basis that the six lines of progression are not bona fide. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977); *Hankerson* v. *North Carolina*, 432 U.S. 233, 240 & n.6 (1977); *Dandridge* v. *Williams*, 397 U.S. 471, 475-476 & n.6 (1970).

An aspect of a seniority system "cannot be bona fide if an intent to discriminate entered into its very adoption." *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 346 n.28. See, *e.g.*, *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977); *United States* v. *Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981), petition for cert. pending *sub nom. Local 84, IBEW* v. *United States*, No. 80-2117; *Hameed* v. *International Association of Bridge Workers, Local 396*, 637 F.2d 506, 516 & n.11 (8th Cir. 1980).[22] Petitioners concede that until 1963

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system—such as certain aptitude tests (see *ibid.*) or a supervisor's evaluation (see *id.* at 609-610)—might be capable of being satisfied only by an employee who had already worked in the employer's plant.

[22] In our Brief for the United States and the EEOC as Amici Curiae in *Pullman-Standard* v. *Swint* and *United Steelworkers of America* v. *Swint*, Nos. 80-1190 and 80-1193, we discussed the criteria for determining whether a seniority

the plants were explicitly segregated along racial lines in every significant respect. Promotions were determined by seniority, but petitioners prevented senior blacks from obtaining the better-paying fabrication jobs by adopting a rule that strongly discouraged transfers from the prefabrication departments —which had been deliberately kept predominantly black—to the fabrication departments, in which all but the least desirable jobs were reserved for whites.

In 1963, petitioners, under pressure from government agencies, dropped this seniority rule and maintained only the rule that an employee forfeited his seniority when he transferred between branches. On its face, this new system seemed to promise that some blacks could use their seniority to be promoted into jobs previously reserved for whites. But petitioners modified the seniority system with a system of "qualifications" that relied heavily on the standardless, discretionary evaluations of white supervisors—the sort of subjective decisions that have proved to be a recurrent source of racial prejudice. See, *e.g.*, *Alexander* v. *Louisiana*, 405 U.S. 625, 631-632 (1972); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358-359 (5th Cir. 1972). Not surprisingly, this new promotions policy replicated the employment patterns achieved by the explicitly racial regime. The district court and the court of appeals found that this promotions policy, too, was racially discriminatory.

In 1968, petitioners again came under pressure from government agencies,[33] and again they modified

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system is bona fide under Section 703(h) and the relationship between those criteria and the proof of discriminatory purpose under the Equal Protection Clause.

[33] EEOC representatives were involved in inducing the company to change its employment practices in 1968. See J.A. 570-572. The EEOC did not approve the specific measures

their promotion policy. This time the restriction they placed on the pure use of plant seniority was the lines of progression. Because of the lines of progression, four of the most desirable jobs in the plant—previously all-white jobs—were reserved to employees who had served in other traditionally white jobs. This policy also had a predictable effect; after five years and numerous vacancies, the top jobs remained almost exclusively white. See page 7, *supra*. At the same time, between four and five times as many blacks as whites were excluded from the lines of progression entirely, even though the company employed four times as many whites as blacks (see pages 6-7, *supra*; App. 75). In this way, the lines of progression "fostered [a] racially stratified job environment[] to the disadvantage of minority [employees]" (*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973)). "[W]hen the adverse consequences of [an action] upon an identifiable group are [clearly] * * * inevitable * * * a strong inference that the adverse effects were desired can reasonably be drawn." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 n.25 (1979). See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); *Washington* v. *Davis*, 426 U.S. 229, 241-242 (1976). Here, the persistent racial pattern, and the obvious and predictable segregative consequences of the lines of progression, create a strong inference that petitioners adopted the lines in order to maintain that pattern.

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adopted by the company (see 42 U.S.C. 2000e-12(b); 31 Fed. Reg. 10270 (1966)), and there is no indication that the EEOC was aware of the effects of the lines of progression (see J.A. 572), so the EEOC representative's presence at discussions is not evidence that the lines of progression are bona fide.

Notably, both the company, which proposed the lines of progression, and the union, which ratified them, had an extensive history of discriminatory practices. This suggests the presence of impermissible racial purposes. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 267; *Sears* v. *Bennett*, 645 F.2d 1365, 1370-1371, 1373-1374 (10th Cir. 1981), petition for cert. pending *sub nom. United Transportation Union* v. *Sears*, No. 81-221. While the union had merged its segregated locals—under direct pressure from government agencies (App. 75; J.A. 202)—white members dominated the merged union. Thus there is no sufficient reason to believe that the collective bargaining process, which would ordinarily protect employees' interests, adequately protected the interests of black employees in this instance. The more reasonable conclusion is that the union and the company agreed on a policy that would continue the pattern of guaranteeing that senior white employees would receive the best, traditionally white jobs. At the very least, in view of the care with which both the company and the union had always preserved the best jobs for white employees, it is difficult to quarrel with the district court's apparent conclusion that petitioners adopted the lines of progression "at least in part 'because of,' not merely 'in spite of' " the fact that they were likely to continue to give the best jobs to whites. See *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279.

If the lines of progression policy served some substantial legitimate interest, it would be more difficult to conclude that race entered into the decision to adopt them. But petitioners established no business justification for the lines. At the trial, petitioners had every incentive to show that the lines of

progression served a business interest.[34] Although petitioners established that three lines of progression served a business necessity, they offered essentially no business justification for the six lines at issue here (App. 9). The district court accordingly found, in effect, that the six lines do not "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 425, quoting *McDonnell Douglas Corp.* v. *Green, supra*, 411 U.S. at 801. See *Dothard* v. *Rawlinson, supra*, 433 U.S. at 329. Thus it is difficult to escape the conclusion reached by the district court, that the lines of progression were in fact intended to serve the racially segregative objectives that the company and union had repeatedly pursued through a variety of other means.[35]

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[34] The issue at trial was not whether the lines of progression were bona fide but whether they were "related to job performance" within the meaning of *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431. While the *Griggs* standard is different from the test that would be used to determine if the lines of progression were bona fide (see *Dothard* v. *Rawlinson, supra*, 433 U.S. at 328; *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 335-336 n.15), every plausible justification for the lines of progression would also have helped petitioners meet the *Griggs* test.

[35] The explanation which petitioners did offer for the six lines of progression is revealing. A company manager testified that the lines were not the result of any formal studies or any documentary evidence but simply of informal management views developed "over the years" (J.A. 224-225). In short, the lines of progression reflected the same kind of standardless supervisory judgments that were used—and were held to be discriminatory—before the lines of progression were adopted. See also pages 26-27, note 24 *supra*. Moreover, the manager's testimony reinforces the district court's

For these reasons, this Court can affirm the judgment of the court of appeals on the alternative ground that the district court correctly held that the lines of progression were not bona fide and therefore not within Section 703(h).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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implicit conclusion that the lines of progression were chosen because they were another means of maintaining the traditional employment patterns at petitioners' plants.

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No. 80-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY, TOBACCO WORKERS' INTERNATIONAL UNION, AND LOCAL 182 OF TOBACCO WORKERS' INTERNATIONAL UNION,

Petitioners,

—v.—

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR,

Respondents.

AMERICAN BRANDS, INC.,

Petitioner,

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS THE AMERICAN TOBACCO COMPANY AND AMERICAN BRANDS, INC.

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* American Brands, Inc. has no parent, subsidiary or affiliate required to be reported under S. Ct. R. 28.1.

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—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS THE AMERICAN TOBACCO COMPANY AND AMERICAN BRANDS, INC.

I.

THE EEOC AGREES THAT § 703(h) APPLIES TO POST-ACT SENIORITY SYSTEMS AND FURTHER RECOGNIZES THAT THE BUSINESS NECESSITY DEFENSE IS INAPPROPRIATE IN A SENIORITY SYSTEM CASE

Respondent Equal Employment Opportunity Commission ("EEOC") agrees with petitioners' fundamental position in this case: seniority systems should not be deprived of § 703(h) analysis, requiring proof of intentional discrimination, simply because such systems may have been instituted or revised after July 2, 1965.

Recognizing "the important role that seniority plays in collective bargaining, and its historic importance to workers" (EEOC Br. 25), and conceding that the "business necessity" defense thus is "inappropriate" to seniority system cases (EEOC Br. 33), the EEOC also substantially agrees as to at least some of the policy reasons why the result petitioners urge should prevail.

Having made these significant concessions and finding itself unable to support the reasoning of the court of appeals, the EEOC struggles to salvage the result below by concocting a "timely challenge to adoption" theory. For the reasons discussed in Parts II and III, *infra,* the EEOC's artificial theory should be rejected as impractical and totally unfounded in policy or in law.

Even the *Patterson* respondents suggest that, because of the national labor policy favoring seniority and collective bargaining, there may be some "circumstances" under which "seniority systems adopted after the effective date of Title VII may be protected by § 703(h) despite their discriminatory impact" (*Patterson* Resp. Br. 92).

Both respondents, however, fail to appreciate the importance of the focus that § 703(h) intent analysis brings to seniority systems. The *Griggs*[1] analysis applied at trial in 1974 and

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1 *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

invoked by the court of appeals simply does not accord seniority systems the special treatment Congress has said they deserve. With its emphasis on statistical adverse impact and perpetuation of effects of past, currently non-cognizable events, the *Griggs* test prematurely ends the inquiry.[2] Under *Griggs* analysis, statistical evidence of disparate impact establishes a *prima facie* case and a conclusive inference that discrimination exists, and the employer and union are then relegated to the task of establishing the restrictive "business necessity" defense, as was required by the courts below,[3] in

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2 In the search for purposeful discrimination that § 703(h) requires, statistical evidence of disparate impact "may provide an important starting point." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). But where legitimate reasons are present to explain any statistical disparity, "disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose." *City of Mobile, Ala.* v. *Bolden*, 446 U.S. 55, 70 (1980) (citations omitted). Thus, in contrast to the talismanic quality statistics acquire in *Griggs* cases, § 703(h) cases require proof by plaintiffs that the decisionmaker, *i.e.*, the employer and union, "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979).

3 Under the typical business necessity defense as applied below (*see, e.g.*, JA 79-80) to petitioners' lines of progression, the test is "whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business," and whether there are "available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

Respondents were found below to have established a *prima facie* case solely through the use of statistics. *See, e.g.*, district court opinion on liability (JA 9) ("[e]ven without specific proof of overt or particular acts of discrimination, the statistical evidence is more than sufficient to establish a *prima facie* case of discrimination for the two branches"); and Widener, J., dissenting in *Patterson II* (JA 122) ("[t]he evidence in this case upon which the district court found liability was statistical. That court did not find 'specific proof of overt or particular acts of discrimination.' The whole case must be read with that background"). Having found discrimination solely from the statistics without any inquiry as to intent, the district court imposed liability for petitioners' failure to prove a business necessity defense, merely noting American's argument "that there is no discrimination and hence, with few exceptions, [that it need] not undertake to show any business necessity" (JA 9).

order to preclude liability for that assumed discrimination. Such a result severely undermines the national policy embodied in § 703(h) favoring seniority and collective bargaining, for it precludes any meaningful probe of intent and causes "past discrimination . . . , in the manner of original sin, [to] condemn . . . action that is not itself unlawful." *City of Mobile, Alabama* v. *Bolden,* 446 U.S. 55, 74 (1980).

Instead of *Griggs* and business necessity defense analysis, the proper inquiry for a post-Act seniority system is one that proceeds under § 703(h) and focuses on the intent existing at the time the system was instituted or revised. While the court below foreclosed this inquiry with respect to the lines of progression, it directed precisely such an examination as to the bona fides of another aspect of the seniority system, the no-transfer rule. Clearly the same analysis should apply to both aspects of this single seniority system. Even if there is a statistical adverse impact, a seniority system nonetheless should be protected by § 703(h) if the intent surrounding the adoption and maintenance of the system is benign. Otherwise, employers and unions would not be entitled to treat past acts of discrimination as "the legal equivalent of a discriminatory act which occurred before the statute was passed." *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558 (1977).

In this regard it must again be emphasized that petitioners have never claimed that seniority systems are immune from attack, although both respondents would have the Court erroneously believe otherwise.[4] As was previously explained in the Petition for a Writ of Certiorari (Pet. 16 n.16), the result petitioners urge would by no means ensure *per se* immunity for post-Act systems. It would remain for the lower courts to conduct evidentiary inquiries, as has been ordered here on the no-transfer rule, to determine whether the practice "is not 'bona fide,' or . . . [whether] differences in employment con-

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4 *E.g.*, "[p]etitioners assert that unless they are free to adopt such measures as the lines of progression policy without regard to the prohibitions of Title VII, they will be unable to adapt to changing circumstances" (EEOC Br. 13); § 703(h) is an "impenetrable barrier . . . immuniz[ing]" seniority systems (*Patterson* Resp. Br. 38).

ditions that it has produced are the 'result of an intention to discriminate because of race.' " *California Brewers Association* v. *Bryant*, 444 U.S. 598, 611 (1980).

Furthermore, there is simply no merit to the *Patterson* respondents' contention that unless the result below prevails, victims of discrimination will be deprived of a remedy. (*Patterson* Resp. Br. 81.) Because § 703(h) "does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory," *United Air Lines, Inc.* v. *Evans*, 431 U.S. at 560, a system which is not found to be bona fide under § 703(h) will not be upheld, and the full panoply of relief, including an award of retroactive seniority, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), will be available.

The findings and record below with respect to petitioners' lines of progression strikingly demonstrate the difference in result between a § 703(h) intent analysis and a *Griggs* impact and business necessity defense analysis. The courts below held that six of the nine lines at issue did not meet the "business necessity" test as that test was defined by the court of appeals in *Robinson* v. *Lorillard Corp.* (*see* n. 3, *supra*), although three lines did meet that test. Presence or absence of discriminatory intent with respect to the adoption and maintenance of the lines was immaterial to the inquiry.

Had such an intent analysis been applied, a different result quite likely would have obtained. Even the EEOC recognizes that where seniority principles are at issue, it is "inappropriate to apply the 'business necessity' requirement" (EEOC Br. 33). Rather, where challenge is made to an aspect of a seniority system, the EEOC describes the proper inquiry as one which looks to whether the practice has a "business justification," serves "some substantial legitimate interest," or is "related to job performance" (EEOC Br. 40-41). That is, essentially, the same inquiry as one which looks to the intent behind the practice. Thus, the EEOC seems to concur that articulation by the employer and union of a legitimate "business justification" should negate the conclusory inference of discriminatory

animus that arises from a mere statistical showing of adverse impact or perpetuation under *Griggs. See, e.g., Texas Department of Community Affairs* v. *Burdine,* 101 S. Ct. 1089 (1981).

Indeed, the lines of progression struck down below for failure to establish a "business necessity" defense would have satisfied the EEOC's "business justification" approach. The testimony offered by respondents' own expert would have provided strong support for a finding that the six remaining lines had a "business justification," *i.e.,* were reasonably premised on an intent to satisfy business needs and not an intent to discriminate. For example, when asked on direct examination for his opinion regarding the business necessity of the line of progression which specified that an employee first had to be a machine operator before becoming a learner adjuster, respondents' expert stated: "On the basis of my understanding of that job, *I think this would be desirable* but not necessary" (Reply App. 1; emphasis added).[5] He also testified that the catcher to examiner-maker line should not "necessarily be required," although he acknowledged that an examiner should also have the qualifications to be a catcher (Reply App. 2). He testified similarly as to the line of progression from line searcher to examiner-packing. On the assistant adt-dryer operator to adt-dryer operator and assistant textile dryer operator to textile dryer operator lines, the expert's opinion was that first serving in the entry position of those lines "*would be desirable.* I don't think it's absolutely necessary . . . but being an assistant *would be a desirable entry*" (Reply App. 2; emphasis added).[6]

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5 For the convenience of the Court, relevant trial testimony of respondents' expert concerning the lines of progression is reprinted as an Appendix to this Reply Brief. References to the expert's testimony will be made by citation to "Reply App."

6 The differences perceived by respondents' own expert between the six lines which did not meet the business necessity defense test and the three which did were not substantial. That expert testified he felt that

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Thus, had a § 703(h) intent analysis and a "business justification" approach been the touchstone, all nine lines would likely have been upheld.

II.

THE "TIMELY CHALLENGE TO ADOPTION" THEORY CONJURED BY THE EEOC IN AN EFFORT TO RESCUE THE DECISION BELOW SHOULD BE REJECTED AS IMPRACTICAL AND WITHOUT BASIS IN POLICY OR LAW

Although conceding that the rationale of the court of appeals was "too broad" (EEOC Br. 11), the EEOC proceeds nonetheless to conjure a theory in an attempt to rescue the result below holding petitioners' lines of progression outside the ambit of § 703(h). In essence, the EEOC urges that the Court construe § 703(h) as containing a "distinction between the decision to *adopt* an aspect of a seniority system," which would be consigned to *Griggs* analysis, but only if timely challenged, and "the subsequent employment decisions made in *implementing* the system," (*id.*), which would be entitled to § 703(h) analysis.

This convoluted theory applying different modes of analysis to decisions "adopting" versus decisions "implementing" seniority systems is impractical and has no support in policy or in law.

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"being a learner adjuster prior to an adjuster is *correct*. I would say that would be *all right*. It seems to be a *logical way to do it*" (Reply App. 1; emphasis added). He characterized the making or packing adjuster to overhaul adjuster line simply as "sufficient. I think this is all there is to it" (Reply App. 2). Finally, he testified that the adjuster helper-prefabrication to adjuster-prefabrication line was not really "necessary. . . but I think having been assistant would be a desirable entry to prefab adjuster" (Reply App. 2). Given this testimony, there can be little question that the six lines would have passed muster under the EEOC's "business justification" formulation.

A glaring example of the problems which would be caused by the EEOC's theory follows from its own rather amazing statement that "[t]here is no need to consider the claim of sex discrimination in connection with the lines of progression at issue here" (EEOC Br. 8 n.14). For some reason, the EEOC urges this Court to ignore the fact that the trial and appeals of these cases involved both race and sex discrimination with respect to the operation of the lines of progression.[7]

The likely explanation for the EEOC's unwillingness to apply its theory to the sex discrimination charges is that those charges clearly fall outside its "timely challenge to adoption" theory. In this case, it is uncontested that while the race discrimination charges underlying the *Patterson* case were filed in January and February, 1969, the *sex* discrimination charges supporting the *EEOC* case were not filed until *April 8, 1969* (JA 6). Since no charge of *sex* discrimination was lodged until more than 90 days (the period then applicable) after the November 14, 1968 date on which the EEOC claims the lines of progression were "adopted" (*see* discussion in Part III, *infra*), the sex discrimination charges do not fit within the EEOC's "timely challenge to adoption" theory.

Thus, the absurd consequence of the EEOC's theory under its view of the facts of this case would be the application of two separate analyses to the same seniority system. As to the race discrimination charges in *Patterson, Griggs* analysis and the business necessity defense would remain applicable to the lines of progression; whereas in the *EEOC* sex discrimination case the very same system would be analyzed under § 703(h). The obvious impracticability of applying two different tests to the same system demonstrates a further reason why all seniority systems should be analyzed under § 703(h), regardless of when the system was adopted or when a charge is filed.

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7 The district court expressly held that the six lines of progression not justified by any business necessity "have perpetuated past discrimination on the basis of *sex and* race" (JA 32; emphasis added).

In addition, strong policy interests militate against the EEOC's theory. Petitioners have pointed out that the rule below consigning post-Act seniority systems to disparate impact and business necessity defense analysis will, if allowed to prevail, have a chilling effect on labor relations and affirmative action. The EEOC's "timely challenge to adoption" theory does nothing to alleviate such concerns.

Before deciding to adopt or revise a seniority system, management and labor, whether under the EEOC's theory or the rule announced below, would have to be sure that the racial and sexual breakdown within departments, lines of progression or other seniority units mirrored the relevant statistics. Under the EEOC's theory, so long as a timely charge was filed after the practice was adopted, the absence of any discriminatory intent behind the adoption would be irrelevant because no real inquiry would be made as to intent. As was equally true of the restrictive holding below, the unwarrantedly decisive role statistics would play under the EEOC's theory would foreclose an intent inquiry and frustrate the critical elements of national labor policy recognizing "the give and take of free collective bargaining [and] the specific characteristics of a particular business or industry." *California Brewers Association* v. *Bryant*, 444 U.S. at 608. The EEOC's theory thus substantially undermines the "[s]ignificant freedom [which] must be afforded employers and unions *to create* differing seniority systems" (*id.*; emphasis added).

As a further consequence of the EEOC's theory, employers and unions would be reluctant to undertake good faith changes in seniority systems. Such changes, even if intended to benefit persons covered by Title VII, would be discouraged because if the "adoption" of the change were timely challenged it would be consigned to a *Griggs* and business necessity defense analysis, making valueless any laudatory intent to lessen or eliminate discriminatory effects. The understandable inclination would be to retain pre-Act systems, or post-Act systems which

were not timely challenged at the point of adoption, in order to preserve § 703(h) bona fides analysis pursuant to *Teamsters.*[8]

This unfortunate consequence of the EEOC's theory would be exacerbated where, as in the instant case, factors extraneous to the seniority system, such as a static company and industry, declining consumer demand and increased automation severely limit promotional opportunities. To state the problem another way, a statistical "snapshot" of disparate impact taken at—or only a matter of days after—the date of adoption of a seniority change reveals little, if anything, of the good faith intent behind the change. Yet, good faith intent behind a seniority change does not become any less so simply because of when the snapshot is taken. *Cf. California Brewers,* 444 U.S. at 610 n.22 ("surely, what would be part of a 'seniority system' in an expanding labor market does not become something else in a declining labor market").[9] But the EEOC's theory, with its

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8 *International Bhd. of Teamsters* v. *United States,* 431 U.S. 324 (1977).

9 The case at bar provides a good example. In his 1970 study, *The Negro in the Tobacco Industry,* Professor Northrup reported that beginning even prior to Title VII's effective date and continuing thereafter, The American Tobacco Company had taken great strides to increase promotional opportunities for blacks. As he noted, however, declining consumer demand and increased automation severely limited job opportunities (*id.* at 66):

> In the American tobacco plants, opportunities for promotions continued to be relatively infrequent. Seniority was widened and many seniority lists combined in all plants, and Negroes were promoted to once all-white jobs. Indeed, this occurred with enough frequency in Richmond that white employees charged Negroes were favored at their expense.
>
> The facts appear to be that American has opened up all jobs to blacks, but that declining sales and continued automation preclude any significant opportunity for advancement.

The finding of liability by the district court mirrored Professor Northrup's observations (JA 8-9):

> The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further implementation. As indicated in the findings of fact, however, black and female

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narrow focus on statistics within an abbreviated time frame, would preclude any evidence of good faith intent.

There is, moreover, no foundation in law for the purported distinction between decisions "adopting" and decisions "implementing" seniority systems.[10] Certainly the plain language of the statute contains nothing which would indicate that Congress intended the "adoption" of a seniority system to be entitled to any less protection than the subsequent "implementation" of that system.[11] Whether challenge is made to its

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employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. *This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring.* (Emphasis added.)

10 The EEOC suggests (*see* EEOC Br. 21) that support for its "timely challenge to adoption" theory can be divined from *Local Lodge No. 1424, Int'l Ass'n of Machinists* v. *NLRB*, 362 U.S. 411 (1960). That case, which involved an interpretation of a six-month statute of limitations in the National Labor Relations Act, did not hold that a different analysis should be applied to decisions "adopting" versus decisions later "implementing" employment practices. Rather, *Local Lodge No. 1424* held only that the adoption of an alleged unlawful labor practice was not actionable unless challenged within the period allowed by Congress in the statute of limitations. Challenges made outside that period were time-barred, whether styled as a challenge to "adoption" or as a challenge to "implementation." In any event, the *Local Lodge 1424* Court carefully restricted its holding to that case only (362 U.S. at 424 n.15):

> Our conclusion that the complaints giving rise to the judgment under review are of necessity 'based upon' the unfair labor practice of execution of the agreement, and are barred by time, *has drawn on this statute's purpose and history, and we do not assert the universal applicability of our resolution of the particular question presented for decision.* (Emphasis added.)

11 The EEOC argues that its theory is supported by legislative history, which it claims indicates that Congress' "principal purpose" (EEOC Br. 25) in enacting § 703(h) was "to protect the expectations employees acquired" (*id.* at 22) through the operation of seniority systems.

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adoption or implementation, so long as the system is bona fide and "not the result of an intention to discriminate" it should receive § 703(h) protection.

The EEOC lamely resorts to lifting the words "pursuant to" out of § 703(h) and claiming these words reveal that a "decision to adopt a seniority system is plainly not a decision made 'pursuant to' that system" (EEOC Br. 20). But such a linguistic exercise is too slim a reed to support the wholly impractical distinction which the EEOC wishes to read into the statute. Had Congress intended so fundamental a distinction, it would have expressed that intent clearly in the statutory language or in the legislative history. But Congress made no such expressions. To the contrary, neither the statutory language nor the legislative history manifest an intention that a distinction be drawn between the adoption and implementation of seniority systems.

In sum, in its contrived attempt to salvage the result below, the EEOC has advanced a "timely challenge to adoption" theory which is unworkable and unfounded in policy and in law. It raises the spectre of two different tests being applied to the same system depending solely upon when charges were filed. One test disregards the actual intent underlying the practice, whereas the other properly necessitates an intent

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According to the EEOC, "[a] timely challenge to the adoption of a seniority system does not endanger this congressional policy, for it occurs before such expectations can develop" (*id.* at 23). Even if one were to assume, *arguendo*, that this was the "principal purpose" behind § 703(h), the fallacy of the EEOC's argument is shown by its failure to recognize that, in a thriving company or industry, a considerable amount of "legitimate expectations" (*id.* at 12) can occur where there is active posting and bidding in the 240 days following the adoption or revision of a seniority system. For it must be remembered that under *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980), charging parties in most deferral states need not file a charge until the passage of 240 days. Whether seniority "expectations" developed during that period are "legitimate" should depend on a § 703(h) intent analysis and not simply on when a charge happens to be filed.

analysis. The EEOC's theory would inhibit management and labor from adopting employment practices to meet a changing economy or industry, and would negate the incentive § 703(h) provides for making good faith efforts to overcome vestiges of past discrimination. Such a result flies in the face of Congress' intent that "significant freedom . . . be afforded employers and unions *to create* differing seniority systems." *California Brewers,* 444 U.S. at 608 (emphasis added). The EEOC's theory should be rejected and § 703(h) should be held applicable to challenges to both the adoption and implementation of post-Act seniority systems.

III.

THE EEOC'S "TIMELY CHALLENGE TO ADOPTION" THEORY SHOULD BE REJECTED IN ANY EVENT AS BEING UNSUPPORTED BY THE RELEVANT FINDING BELOW

Even were one to assume, *arguendo,* the validity of the EEOC's strained and artificial theory, the relevant factual finding below does not permit its application in this case. Under the time period then applicable, unless a charge was filed within 90 days from the date the lines were adopted, the EEOC's theory upholding the application of *Griggs* below could not work. Consequently, the EEOC contends that petitioners "developed and proposed the establishment of nine lines of progression" on November 14, 1968 (EEOC Br. 5) and that the charges filed in January and February, 1969 underlying the *Patterson* race discrimination case provide, *a fortiori,* the necessary timely challenge.

The finding below relative to the issue of the lines' adoption date, however, completely removes the linchpin of the EEOC's theory. To the extent there is any finding concerning the date of the lines' adoption, it is that of the *en banc* court of appeals, which concluded that the lines of progression policy "was not in effect at American in 1965 when Title VII went into effect, but was only *adopted in January 1968* in connection with

American's general revision of its promotional policies" (JA 142-43; emphasis added; citation and footnote omitted).[12] Since the *Patterson* charges were not filed until *one year after January 1968,* the EEOC's "timely challenge to adoption" theory does not work in this case.[13]

IV.

THE BASES OFFERED BY RESPONDENTS AS "ALTERNATIVE" SUPPORT FOR THE COURT OF APPEALS' JUDGMENT WERE NOT CONSIDERED BELOW AND REQUIRE FURTHER FACT-FINDING

Respondents seek to divert the Court from resolving the important question of § 703(h)'s application to post-Act seniority systems by asserting that two separate "alternative bases" provide "dispositive" support for the judgment below. Neither "alternative basis" was passed upon by the *en banc* court below and for that reason alone should not be considered here.

A. Whether the Lines of Progression Are Part of the Seniority System

The *Patterson* respondents state that "length of time served in the line of progression is not a factor" and that consequently

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12 Solely for purposes of the petition and this appeal, petitioners have conceded simply that the lines of progression "[came] into existence after Title VII's effective date" (Pet. 5 n.5), without specifying any particular date.

13 Contrary to both the January 1968 date and the EEOC's November 14, 1968 date, the full record, as the dissenting opinion below painstakingly documented, is "replete with evidence that the lines of progression existed for many years [even] prior to the effective date of the Act" (JA 162; footnote omitted). A remand to the district court to determine whether the lines antedated Title VII's effective date, or were actually established in January 1968 or on some other date, would have been appropriate. In any event, to the extent there is any finding at all on this issue, it is the January 1968 date found by the court of appeals, not the November 1968 date critical to the EEOC's theory.

the lines merely "impose a requirement of service in a lower job" (*Patterson* Resp. Br. 101). Based on their conception of how the lines actually worked, the *Patterson* respondents maintain the lines are not part of any seniority system, are not entitled to § 703(h) analysis and hence were properly held unlawful "under the *Griggs* rationale" (*id.* at 108).

The EEOC, while stating that it "also agrees" with the position that the lines of progression are not part of the seniority system, implicitly recognizes that the ambiguous state of the record on this issue precludes effective consideration by this Court. Without any citation to the record, the EEOC speculates, with obvious hesitation and uncertainty, that the lines were "*apparently* unlike the usual line of progression seniority scheme" and that "*[a]pparently* one day's service in a bottom job was as much benefit to an employee as 40 years' service" (EEOC Br. 35-36 n.31; emphasis added).

These various assertions notwithstanding, because the current state of the record is not clear on precisely how employees entered and moved within the lines according to seniority, the *en banc* court below expressly refrained from even considering this "alternative basis" (JA 142-43 n.3):

> Plaintiffs have contended that 703(h) has no application to the job lines of progression policy because, as administered, the policy was not a seniority system within contemplation of § 703(h). . . . *This was not, however, a factual issue directly litigated in the case and the record as presently composed is ambiguous on it.* In view of our stated basis for deciding that 703(h) has no application to seniority systems instituted after the effective date of Title VII, *we need not address this as a possible alternative basis for decision.* (Emphasis added.)

This suggested "alternative basis" thus runs contrary to the well-established rule that the Supreme Court will ordinarily refrain from passing upon a question not resolved below. *See, e.g., Youakim* v. *Miller,* 425 U.S. 231, 234 (1976) ("[o]rdinarily, this Court does not decide questions not . . .

resolved in the lower court"); *Bivens* v. *Six Unknown Narcotics Agents,* 403 U.S. 388, 397-98 (1971) ("[t]his question was not passed upon by the Court of Appeals, and accordingly we do not consider it here"); *Aetna Casualty Co.* v. *Flowers,* 330 U.S. 464, 468 (1947) (the Court will decline to consider questions "not passed upon by that court [below] nor adequately presented here"). The court below could not have been more explicit in explaining why it did not consider this question, and respondents present no exceptional circumstances justifying a departure from this Court's usual rule of restraint. *See Lawn* v. *United States,* 355 U.S. 339, 362 n.16 (1958); *Duignan* v. *United States,* 274 U.S. 195, 200 (1927).

Because the question of how employees actually exercised their seniority rights to progress within the lines was never "a factual issue directly litigated in the case" (JA 142-43 n.3), it is not possible for any of the parties to point to any express or even implicit findings of fact bearing on this issue. There is no dispute among the parties, however, that seniority governed promotions within the lines. Whether plant or job seniority or a combination of the two controlled movement of employees within the lines, all movement was governed by some measure of time served, and thus the lines of progression had nothing in common with "an educational standard, an aptitude or physical test, or a standard that gives effect to subjectivity." *California Brewers,* 444 U.S. at 609-10. Rather, a determination of who would move within any of the lines always "focuse[d] on length of employment" (*id.*). Employment rights invariably increased as the length of the employee's service increased, regardless of whether the standard of measurement was time in the plant, time in the line or some other measure of time served.

As this Court recognized in *California Brewers,* seniority systems "inevitably come in all sizes and shapes." 444 U.S. at 608. Moreover, the Congress that enacted § 703(h) did not express a preference for any particular seniority concept (*Teamsters,* 431 U.S. at 355 n.41):

> Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression . . . . The legislative history contains no suggestion that any one system was preferred. (Citations omitted.)

The lines of progression here were fully consistent with core concepts of seniority. Since the principal feature of each line of progression was that "preferential treatment [was] dispensed on the basis of some measure of time served in employment," *California Brewers*, 444 U.S. at 606, the lines were even more clearly part and parcel of the seniority system than the ancillary 45-week rule accorded § 703(h) analysis in *California Brewers*.

B. Whether the Lines of Progression Are Bona Fide Under § 703(h)

The alternative basis urged by the EEOC is that, on the present state of the record, the Court can apply § 703(h) analysis and determine "that the six lines of progression are not bona fide" (EEOC Br. 37). In support of this argument, the EEOC points to the fact that the district court expressed, in 1977, the view that petitioners' seniority system was not bona fide.

However, as the *en banc* court of appeals observed in remanding the no-transfer rule for additional proof and a new determination of § 703(h) bona fides, the district court did not properly evaluate petitioners' seniority system under *Teamsters'* teachings (JA 145-46):

> We turn now to the fact that the district court in ruling on the 60(b) motion expressly concluded that in light of *Teamsters*, American's seniority system was not bona fide. . . . However, *we do not think that the record before the district court when it ruled upon the motion justified its specific conclusion that the system was not*

> *bona fide under this test. Certainly there are not in the record before us express findings of fact that would support such a conclusion. Whether there is evidence sufficient to support the requisite findings of fact is doubtful* in view of the understanding of § 703(h)'s application that reigned in this Circuit when the original record was being made. *In consequence, the present record does not permit us to conduct a principled review of the district court's ruling on this point.*
>
> Because the issue of the branch seniority system's bona fides only emerged in its present contours after the original record was made, we conclude that the relief invoked by defendants under 60(b) can only be achieved by reopening the record for additional proof and a new determination of bona fides in light of *Teamsters*. (Emphasis added; footnote and citations omitted.)

The same reasoning is equally applicable to the lines of progression aspect of the seniority system. Given the nature of the remand already deemed appropriate by the court of appeals, therefore, this Court should decline the suggestion of the EEOC to rule on the bona fides of the lines of progression and should instead direct the Fourth Circuit to include the lines with the no-transfer rule in the remand for a determination of bona fides under § 703(h).

CONCLUSION

For these reasons, the decision of the court of appeals should be reversed, the EEOC's "timely challenge to adoption" theory should be rejected, and the case should be remanded for a determination whether the lines of progression are bona fide under § 703(h) and not the result of an intention to discriminate.

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January 8, 1982

REPLY APPENDIX

[Excerpts from the July 1974 trial testimony of James L. Rigassio, an expert witness called on behalf of the *Patterson* plaintiffs, concerning the "business necessity" of American's lines of progression]

[433]

BY MR. MARSH [counsel for *Patterson* plaintiffs]:

* * *

Q. Would you indicate what the opinion is?

My question was initially: Do you have an opinion of the necessity of a person serving as a learner adjuster before becoming an adjuster?

You said you did?

[434]

A. [JAMES L. RIGASSIO] Yes, I do have an opinion, yes.

Q. And what is your opinion, sir?

A. Well, on the basis of my understanding of the job, I feel that being a learner adjuster prior to an adjuster is correct.

I would say that would be all right. It seems to be a logical way to do it.

MR. MARSH: Do you want to withdraw your objection?

MR. LEVIT [counsel for union defendants]:

No. I am going to reserve for cross-examination, Mr. Marsh.

BY MR. MARSH:

Q. Would you look at the second job?

A. Learner adjuster?

Q. And tell us whether or not he must have been a qualified operator—

A. I would say this: On the basis of my understanding of that job, I think this would be desirable but not necessary.

Q. What about three?

A. The examiner making—this is a quality control type of position. I don't really feel that having been a catcher would necessarily be required.

I would say having the qualifications to be a catcher would be fine.

[435]

Q. All right. The next job?

A. The next job, as I read it here, is examiner-packing. And again, this is a—to my understanding—a quality control type of job, and I don't really feel that being a line searcher is necessary.

Q. And number five?

A. The adt-dryer operator. Here, I would say being an assistant would be desirable. I don't think it's absolutely necessary. You could have various trainees moving to that position, but being an assistant would be a desirable entry.

Q. What about the next one?

A. Textile dryer is the same as the adt-dryer, same as the previous one.

Q. I don't believe the next one is applicable. What about the overhaul adjuster?

A. Overhaul adjuster, I think having been a qualified making or packing adjuster would be sufficient. I think this is all there is to it.

Q. What about number nine?

A. Prefab adjuster. I don't really think it's necessary to have been an oiler prior to being a prefab adjuster. Being an assistant, I would say is desirable.

Again, you could, perhaps, consider a trainee position, but I think having been assistant would be a [436] desirable entry to prefab adjuster.

MR. MARSH: Your Honor, I have no further questions of Mr. Rigassio.

THE COURT: Does the Commission have any questions?

MR. KARNES [counsel for plaintiff EEOC]: I'm sorry, Your Honor. We don't have any questions of this witness.

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No. 80-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE AMERICAN TOBACCO COMPANY, *et al.*,
Petitioners,

v.

JOHN PATTERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1199

THE AMERICAN TOBACCO COMPANY, *et al.*,
Petitioners,
v.
JOHN PATTERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS BAKERY, CONFECTIONERY AND TOBACCO WORKERS INTERNATIONAL UNION AND ITS LOCAL 182

ARGUMENT

I. RESPONDENT EEOC'S ALTERNATIVE STATUTORY INTERPRETATION

Respondent EEOC, recognizing that the judgment below cannot be sustained on the lower court's rationale, unceremoniously abandons that rationale in favor of a contrived dichotomy between the adoption and implementation of *bona-fide*, post-Act seniority systems. Section 703(h) states that "it shall not be an unlawful employment practice . . . to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system . . . provided that such differences are not the result of an intention to discriminate." The EEOC concedes that those words were meant to protect the use of such seniority systems whether adopted before or after the effective date of Title VII. But the EEOC argues that,

by the words of § 703(h), Congress intended that a union and an employer may be found to violate Title VII by *adopting* without "an intention to discriminate" a "bona fide seniority system" whose every "appl[ication]" is protected by § 703(h). As we show below, the EEOC's interpretation of § 703(h) flies in the face of the language of that provision and would undermine a major purpose Congress meant that provision to serve.

The proper reading of § 703(h) is that the provision delineates the class of systems whose operation Congress wished to protect—"bona fide seniority systems" that are not the product of "an intention to discriminate." The critical point is the Congressional decision to protect that class of seniority systems, but not others. The EEOC's reading of § 703(h) would make it illegal to adopt, and in reality to apply, seniority systems that fall precisely within that protected class, and thus would thwart the Congressional design.

For all practical purposes, in the context of a Title VII challenge to a seniority system there is no way to separate adoption of a system from application of the system. The illusory nature of the EEOC's distinction between "application" and "adoption" is apparent when one considers the putative basis for a challenge to the *adoption* of a system and what might be the remedy for such a challenge. The *adoption* of a system in and of itself could have no adverse impact upon anyone; only its admittedly lawful *application* could have such an impact. Thus, under the EEOC's theory, the *adoption* of a seniority system could be a violation only if its *application* would result in an " 'artificial, arbitrary and unnecessary barrier[] to employment * * * which operates to exclude [blacks and] cannot be shown to be related to job performance.' " EEOC Br. 29 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431). And, the remedy for the "adoption" violation EEOC would create, to be meaningful, would necessarily include an injunction against *application* of the system

(and presumably backpay for any black employees adversely affected by *application* of the system). If the remedy did not forbid the *application* of the system (and compensate the victims of such *application*), it would be meaningless. Yet, if the remedy did forbid the *application* of a bona fide seniority system adopted without an intention to discriminate, it would be forbidding precisely what the EEOC concedes Congress meant to protect—precisely what § 703(h) tells employers and unions they may lawfully do.

There is not a word in the legislative history to suggest that Congress meant to distinguish between adoption and application of a bona fide seniority system. Bereft of such support, the EEOC puts forward its reading of § 703(h) as a *post hoc* means to "reconcile[]" § 703(h) "with the central purposes of Title VII . . . while not enforcing the court of appeals' more far-reaching . . ." interpretation of Title VII. EEOC Br. 18. The EEOC's hypothesis is that "no purpose of Section 703(h) would be served—and the central purpose of Title VII would be disserved—by" the interpretation of § 703(h) submitted by the petitioners. *Ibid.* But the EEOC's own reasoning negates that hypothesis.

The EEOC fashions its interpretation of § 703(h) as if the only Congressional consideration underlying that provision were the protection of employee seniority expectations. Once having arrived at its interpretation, however, the EEOC then acknowledges that there was at least one other Congressional interest in enacting § 703(h). In the EEOC's words,

> [T]he seniority principle . . . is of "overriding importance" in collective bargaining and in the organization of the workplace. . . . In considering Title VII and Section 703(h), Congress recognized that unions almost universally use seniority to allocate scarce benefits among their members. . . . The seniority principle is thus often vital to a union's efforts to aggregate and reconcile the conflicting in-

> terests of those it represents . . . a central aspect of a union's role under the federal labor laws.
>
> Accordingly, Congress may well have believed that to require a union to show that seniority serves a business necessity would undermine one of the central institutions of collective bargaining. Specifically, the business necessity requirement is not well suited to justifying the use of the seniority principle itself—that is, length of service—as a criterion. . . . The principal justification for using seniority as a criterion lies in tradition, and in employees' general willingness to accept it as a fair basis for allocating scarce benefits. [EEOC Br. 30-31.]

But that Congressional interest in the "seniority principle" is not served by the EEOC's interpretation of § 703(h). For the EEOC's interpretation would make the *adoption* of bona fide seniority systems fashioned to serve precisely the purposes listed in the quoted passage unlawful unless the proponents of the system could satisfy the "business necessity requirement"—a result directly contrary to what the EEOC acknowledges was the Congressional intent.

Apparently aware of this defect in its argument, the EEOC turns to the particular system at issue here and claims that this system, albeit by hypothesis bona fide, does not implicate the Congressional purpose in protecting the operation of the "seniority principle . . . in collective bargaining and in the organization of the workplace." Thus, the EEOC states:

> This case, however, does not concern a union's role in reconciling employees' conflicting interests by using a measure that is generally accepted as legitimate; nor does it involve dispensing preferential treatment "on the basis of * * * time served in employment," *California Brewers Association v. Bryant, supra*, 444 U.S. at 606. The lines of progression are a constraint that was imposed on the use of seniority in order to serve management objectives. [EEOC Br. 31.]

As we show in the margin, the EEOC is wrong both in its assertion that § 703(h) is directed only at union and employee interests and in its assertion that the part of the system here at issue is necessarily the product solely of "management objectives."[1] And, equally fatal to its analysis, the EEOC has offered an interpretation of § 703(h) that would apply generally and has offered a justification of that interpretation that does not fit the general situation but only what EEOC wrongly perceives to be the particular facts of this case.[2]

---

[1] Earlier in its brief, the EEOC makes a point of the fact that "[b]y its terms Section 703(h) applies only to employers, not to unions." EEOC Br. 21 n. 22. In fact, it is not uncommon for employers to establish seniority systems in non-union plants. See, *e.g.*, *EEOC v. E. I. DuPont de Nemours*, 445 F. Supp. 223, 248-249 (D. Del. 1978) (rejecting claim that § 703(h) does not apply to an employer's unilaterally adopted seniority system). A bona fide employer seniority system is plainly covered by the terms of § 703(h). Moreover, as we have shown in text, *supra* at p. 3, the EEOC concedes that Congress believed "the seniority principle . . . is of 'overriding importance' in collective bargaining . . . ." And this Court has recognized that seniority systems emerge from "the give and take of free collective bargaining," "reflecting as they do . . . the specific characteristics of a particular business or industry." *California Brewers*, 444 U.S. at 608. For purposes of § 703(h), it is immaterial which party to collective bargaining was the moving force behind a particular aspect of a seniority system. *Ibid.* See also, n.2, *infra*.

Nor should it be assumed that narrowness in a seniority system invariably reflects only the employer's desires. As stated in the treatise recognized by this Court to be definitive (Slichter *et al.*, at 140, cited *infra* at 9), the "formulation of [seniority] rules themselves requires the compromise of a great variety of competitive interests among union members." See also, Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1535 (1962).

[2] EEOC's analysis logically suggests not the construction of § 703(h) it urges (under which application of *all* bona fide systems is protected, but adoption of such systems is not protected); rather, the EEOC's analysis suggests a construction under which both adoption and application of employee-favored systems are protected, but neither adoption nor application of systems that serve

Thus, the EEOC is, by its own analysis, incorrect in its initial statement that "no purpose of Section 703(h) would be served" by the interpretation of § 703(h) offered by petitioners. See *supra* p. 3. The other premise of the EEOC's hypothesis—that "the central purpose of Title VII would be disserved" by petitioners' interpretation of § 703(h)—is equally wrong.

The EEOC states that "Congress enacted Section 703(h) not to 'narrow [the] application of * * * [T]itle [VII]' or undermine its basic objectives but only to 'clarif[y] its * * * intent and effect.' 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey) . . . ." EEOC Br. 18 (brackets in original). The EEOC apparently takes Senator Humphrey's statement to mean that Title VII, in §§ 703(a) and (c), was meant prior to the addition of § 703(h) to outlaw innocently motivated seniority systems that perpetuate the effects of pre-Act discrimination—unless justified by business necessity—and thus that § 703(h) should be read as narrowly as possible to minimize the interference with the objectives of §§ 703(a) and (c). But Senator Humphrey's statement cuts in quite a different direction. If § 703(h) was not meant to "narrow [the] application" of §§ 703(a) and (c), and if § 703(h) requires proof of a discriminatory intent before a seniority system can be successfully challenged, then it follows that §§ 703(a) and (c) were not intended in the first place to outlaw seniority systems that are not motivated by an intent to discriminate. The EEOC "implicitly acknowledges" as much when it states

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only management's objectives is protected. For if the EEOC were correct that § 703(h) was not meant to protect a *bona fide* seniority system serving only management's objectives, it would follow that § 703(h) protects neither the adoption nor the application of such a system. The result would be to add the following unwritten exception to § 703(h)'s assurance that "an employer" may differentiate between employees based on a "bona fide seniority system": "except where the employer has established the system to serve his own purposes." Presumably, that exception would be applicable as well to merit systems and incentive systems, which are linked with seniority systems in the language of § 703(h).

that "statements of House proponents of Title VII about its effects on seniority, and statements made by Senate proponents before § 703(h) was proposed, are evidence of the meaning of § 703(h)." EEOC Br. 23 n. 23; see also Union Br. 26-27. Thus, the "central purpose" of Title VII *never* included the invalidation of innocently-motivated seniority systems, and § 703(h) should not be given an artificially narrow construction in deference to values Congress never shared.

II. RESPONDENTS' ALTERNATIVE GROUND FOR SEEKING AFFIRMANCE

1. The Patterson respondents proffer as an alternative basis for affirmance that the "line of progression" policy does not constitute a component of a "seniority system" entitled to the protection of § 703(h). The factual predicate for their argument is stated as follows (Pat. Br. 21):

> When a vacancy occurs in one of the top jobs in a line of progression, only employees who have held a lower job in that line are eligible to bid on the vacancy. (App. 21-22). Among the eligible bidders, promotion is not determined by either seniority in the lower job or seniority in the line of progression; rather, branch seniority controls.

For the latter proposition, respondents do not cite any finding made by the lower courts. Rather, they contend that counsel for petitioners admitted in their briefs filed with the courts of appeals that plant seniority[3] controls within the lines of progression (Pat. Br. 21-23, n. 25). However, as respondents are obliged to acknowledge, counsel for petitioners *later* advised the court of appeals that their earlier statements were factually incorrect, and that upon checking further they had discovered that

[3] In this Company each plant is referred to as a "branch." The court of appeals used the term "branch seniority," whereas the district court used the term "plant seniority." The two terms are synonymous.

"for promotion to a permanent vacancy above the entry level within most lines of progression, job seniority in the immediately proceeding job is controlling" (Pat. Br. 23, n. 25). Respondents *concede* that if the facts are as later reported by counsel to the court of appeals, those lines of progression utilizing job seniority are part of a "seniority system" within the meaning of § 703(h) (Pat. Br. 100-102).

The court below refused to address respondents' contention on this confused state of the record. While noting that the earlier representations of counsel for petitioners furnished "considerable support" for respondents' assertion that plant seniority controlled advancement within the lines of progression (JA 143, n. 3), the court continued:

> This was not, however, a factual issue directly litigated in the case and the record as presently composed is ambiguous on it. In view of our stated basis for deciding that 703(h) has no application to seniority systems instituted after the effective date of Title VII, we need not address this as a possible alternative basis for decision. [*Ibid*].

In light of the court of appeals' statement that the factual issue constituting the essential predicate for respondents' alternative argument was "not directly litigated in the case," respondents are foreclosed from asserting their alternative claim in this lawsuit. As plaintiffs, it was their burden to make a factual record sufficient to enable decision of the legal claim they now advance; they having failed to do so, the issue simply is not presented. And even if that failure were to be somehow excused, the court of appeals' further conclusion that the record is "ambiguous" with respect to the fact essential to the claim would in any event make this a particularly appropriate case for application of the the Court's usual policy not to resolve issues "not passed upon by the court [below] nor adequately presented here," *Aetna Casualty Co. v. Flowers*, 330 U.S. 464, 468.

See also, *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388, 397-398; *Youakim v. Miller*, 425 U.S. 231, 234.

2. We do not mean by the foregoing to suggest that if the facts were as respondents proffer the lines of progression would be unprotected by § 703(h). Quite the contrary, against the remote chance that this Court might opt to reach this issue despite the imperfect state in which it is presented, we proceed to show that even if advancement within the lines of progression were controlled by plant seniority § 703(h) would be fully applicable.

In *California Brewers Ass'n v. Bryant*, 444 U.S. 598, this Court explained that § 703(h) protects

> more than simply those components of any particular seniority scheme that, viewed in isolation, embody or effectuate the principle that length of employment will be rewarded. In order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment.[16]

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[16] See generally S. Slichter, J. Healy, & E. Livernash, *The Impact of Collective Bargaining on Management*, 115-135 (1960). [444 U.S. at 606-607].

At the referenced pages in the seminal Slichter treatise, the authors explain that there are two basic components of every seniority system—the *measure* of seniority, and the unit or "scope of application" of seniority (*i.e.*, the definition of the employees who will be eligible to compete for a particular opportunity):

> A distinction should be made between the "unit" of seniority or its scope of application, and the measurement of, or ranking by, seniority. . . . For example, the phrase "departmental seniority" could have one or both of two meanings. It might mean that the least senior worker in a particular department will be the first laid off, yet ranking in the department might be based on total service with

> the company. In this sense, the term "departmental seniority" refers to the unit for purposes of applying seniority. Or the term may refer to the measurement of seniority; that is, the employees within the department will have their relative status determined by their length of service in the department. It could mean both if the measurement is based on the unit of application.
>
> The scope of the seniority unit and the measurement of service vary according to the use to which the seniority criterion is being put. . . . [W]here competitive job rights are at stake, there may well be one scope-measurement amalgam for temporary layoffs, another for permanent layoffs, another for promotions, and still others for different preferential treatments to be accorded senior employees. To illustrate, a broad unit is likely to apply in the case of layoffs, thus enhancing the chance of a senior man to be retained during a period of work curtailment. In the case of promotion a narrow unit is more likely to govern. [Slicter, *et al.*, at 116-17].

Respondents concede—and this Court has made clear—that § 703(h) protects a decision by an employer and union to limit the unit of competition for a particular opportunity to those employees within a given line of progression or to those holding a particular job (Pat. Br. 100-102). See *Teamsters v. United States*, 431 U.S. 324, 355, n. 41:

> [In 1964], as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression . . . The legislative history contains no suggestion that any one system was preferred.

See also, *California Brewers*, 444 U.S. at 608. By definition, a system under which seniority is measured by "length of time . . . in a job" limits the unit of competition to those who have held that job, and a system under which seniority is measured by "length of time . . . in a line of progression" limits the unit of competition to those who have worked in that line of progression.

Respondents, contend, however, that the parties here, having chosen to confine the unit of competition for certain jobs to those who have held the next lower job, lost the protection of § 703(h) by selecting length of service in the plant, rather than length of service in the job, as the *measure* of service for that competition. But *Teamsters* provides the complete answer to that contention: as among the possible choices, "[t]he legislative history contains no suggestion that any one . . . was preferred", 431 U.S. at 355, n. 41.

Respondents argue that if plant seniority is the *measure* of competition, limiting eligibility to compete to those incumbent on particular jobs interposes an "eligibility" requirement that is external to the seniority system, just as would limiting eligibility to those who had a college degree. (Pat. Br. 106-107). But, again, respondents' argument is really with the measure of seniority chosen in collective bargaining, and not with the rules defining who may compete. The definition of the unit of competition here is precisely the same as it is in a pure job seniority system, which, as we have discussed, respondents acknowledge is protected by § 703(h). Thus, the definition of the unit of competition as occupancy on a particular job creates the same "eligibility requirement" as in the job seniority system respondents concede is protected.

Moreover, in *California Brewers*, this Court rejected an argument analytically indistinguishable from that of respondents. In that case, the seniority agreement defined the "unit of competition" as limited to those employees who were classified as "permanent," but used plant or industry service as the measure of competitive seniority. The Court ruled that the fact that that system had a measure of competition that was broader than the unit of competition did not deprive the system of the protection of § 703(h). 444 U.S. at 609.

Respondents contend finally that a system defining the *unit of competition* more narrowly than the *measure* of

seniority "depart[s] significantly from commonly accepted concepts of 'seniority' " (Pat. Br. 103-104). That contention is refuted by both the Slichter treatise and an authoritative Labor Department study of collective bargaining provisions.[4]

In sum, respondents' effort to take such systems outside the protection of § 703(h) is foreclosed by the construction given that section in *Teamsters* and *California Brewers*.[5]

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[4] See U.S. Dept. of Labor, Bulletin 908-11, *Collective Bargaining Provisions-Seniority* (1949), 15, listing as a traditional seniority system "seniority applied by department but computed on the basis of total plant or company service." And Professors Slichter *et al.* point with approval to the

> trend . . . toward the use of a single seniority date, usually the date of hire in the company or the plant, regardless of the units of seniority application. Ranking *within any given unit* by date of original hire in the company is becoming more prevalent.

Slichter *et al.*, *supra*, 117 (emphasis added).

[5] Respondents' proffered interpretation would accord § 703(h) consequences that Congress could not conceivably have intended. For under respondents' interpretation, the narrowest seniority systems—those that have the greatest disparate impact upon victims of past assignment discrimination—would enjoy the protection of § 703(h), while broader systems that enable those victims to advance more rapidly to the better jobs in the plant would not. Thus, under the system that respondents concede is protected by § 703(h) —that in which advancement is governed by seniority on the preceding job—a black employee discriminatorily assigned prior to Title VII to a different part of the plant would first have to secure a transfer to the lowest job in a line of progression, and upon transferring would be last-in-line among the occupants of that job in ability to progress to the next job in the line; and that same disability would be encountered at each step up the line of progression. This reality, including the deterrent effect it has upon employees' willingness to transfer, is described in Slichter, *et al.*, *supra*, at 117-118. By contrast, if advancement up the line of progression is on the basis of *plant* seniority, the discriminatee upon securing a transfer to a new line of progression would be able to compete for promotions using his full plant seniority; he

III. THE PATTERSON RESPONDENTS' ALLEGATIONS OF INTENTIONAL DISCRIMINATION

The arguments in the brief for the Patterson respondents respecting the language and history of §703(h) all are adequately addressed in our opening brief. But those respondents devote the majority of their brief to a lengthy but wholly irrelevant exegesis of claimed intentional discrimination in other industries, other plants, as well as in the plants involved in this case. But in the present posture of this case the seniority system here is assumed to be *bona fide*.[7] The issue here is purely one of statutory interpretation: is § 703(h) applicable to *bona fide* seniority systems adopted after the effective date of Title VII. Respondents' allegations regarding intentional discrimination are immaterial here. If our interpretation of § 703(h) is sustained, respondents will have a full opportunity on remand to prove, if they can, that the lines of progression like the policy regarding company-wide transfer are not *bona fide*.

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would not automatically be last-in-line for each promotion, and indeed might well be first-in-line.

[7] EEOC contends that the lines of progression were not *bona fide*. EEOC Br. 35. The *en banc* court concluded that not only were there no findings of fact by the trial court to support such a conclusion, but that it is doubtful "[w]hether there is evidence to support the requisite findings of fact . . . [.]" JA 146. An inquiry as to the *bona fides* of other parts of the seniority system has already been ordered by the court below, and surely any initial fact-finding should be done in the district court rather than this Court.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC), with the written consent of all parties,[1] respectfully submits this brief as Amicus Curiae in support of the Petitioners.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members or their constituents are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration; that is, whether the Court of Appeals for the Fourth Circuit has erred in concluding that Congress intended that the immunity from Title VII liability afforded bona fide seniority systems by Section 703(h) of Title VII should extend

[1] Their consents have been filed with the Clerk of the Court.

only to seniority practices instituted before the Act's effective date.[2]

At issue in this case, as in *Pullman-Standard v. Swint*, U.S. Nos. 80-1190 and 80-1193, is the continued viability of the protection Congress extended to bona fide seniority systems in § 703(h). The Fourth Circuit in *Patterson*[3] and the Fifth Circuit in *Pullman-Standard*[4] have advanced interpretations of that section which are at odds with this Court's holding in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and which would improperly restrict the protections of § 703(h). Accordingly, because of the potentially enormous impact upon seniority systems and the rights and benefits accrued thereunder, this Court's disposition of those cases is of vital concern to the nation's employers, employees, and unions.

STATEMENT OF THE CASE

Plaintiffs in this employment discrimination case allege that the operation of a lines of progression

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[2] Because of its interest in issues involving interpretation of Section 703(h) of Title VII, EEAC has filed briefs as Amicus Curiae with this Court in *Pullman-Standard v. Swint*, Nos. 80-1190 and 80-1193; *California Brewers Association v. Bryant*, 444 U.S. 598 (1980); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Airlines v. Evans*, 431 U.S. 553 (1977); and *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

[3] *Patterson v. American Tobacco Co.*, 634 F.2d 744 (4th Cir. 1980) (*en banc*).

[4] *Swint v. Pullman Standard*, 624 F.2d 525 (5th Cir. 1980).

promotional policy instituted in 1968 violates Title VII.[5]

In the *en banc* opinion before this Court, the circuit court held that Congress intended the protections of § 703(h) to apply only to those systems in existence on the effective date of Title VII and to routine post-Act applications of such systems. Because the lines of progression policy was adopted after the effective date of Title VII, § 703(h) was found to have no application, whether or not the policy was considered a seniority system. As a result, the Fourth Circuit held that the discriminatory effect of that policy was properly evaluated by the district court under the disparate impact test of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In other words, the Fourth Circuit has concluded that it was the intent of Congress to immunize from Title VII liability only those seniority systems in existence prior to the Act's effective date and to require that the legality of pre-Act and post-Act systems be evaluated pursuant to widely, and often crucially, differing legal standards.

SUMMARY OF ARGUMENT

The Fourth Circuit's holding would implicitly repeal § 703(h) for all post-Act seniority systems and make the validity of such systems depend upon

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[5] There is a dispute regarding whether the lines of progression policy was implemented in 1968 or at an earlier time, prior to the effective date of Title VII. Compare *Patterson*, 634 F.2d 744, 757-766, dissent of Judge Widener, *with* the majority's reply, *Id.* at 749 and n.4. For purposes of analysis of the majority's holding, however, the Amicus assumes that the lines of progression policy was implemented in 1968.

whether or not they perpetuated the effects of past employment practices. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Moreover, the court's opinion would effectively discourage employers and unions from changing seniority systems. That standard and result are directly contrary to this Court's holdings and the intent of Congress.

As this Court has acknowledged, "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation." *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 766 (1976). In § 703(h) of Title VII, Congress recognized the importance of seniority systems, as well as the process of independent collective bargaining in which they are negotiated, by providing that unless intentional discrimination is involved, the operation of such systems "shall not be an unlawful employment practice." It is apparent from this Court's decision in *California Brewers Association v. Bryant*, 444 U.S. 598 (1980), that the immunity from Title VII liability extended by § 703(h) is prospective, and protects any neutral, bona fide seniority system, whenever adopted.

Congress recognized that neutral bona fide seniority policies could have a "disparate impact" upon more recently hired minority group members, but determined that the protection of bona fide seniority systems was of overriding importance. As its resolution of competing interests, Congress determined that "[p]ost-Act discriminatees . . . may obtain full 'make whole' relief, including retroactive seniority under *Franks v. Bowman* [424 U.S. 747 (1976)] . . .

without attacking the legality of the seniority system as applied to them" (emphasis added). *Teamsters v. United States*, 431 U.S. at 347.

The circuit court's reading of § 703(h) contradicts the unambiguous language of the section, which unqualifiedly applies to all bona fide systems. Moreover, the legislative history of § 703(h) indicates that Congress intended that Title VII would not result in setting aside, or making illegal in the future, neutral, bona fide seniority systems. Statements of the sponsors of the bill were inserted into the record to respond to objections of the opponents to Title VII that bona fide seniority systems would be set aside. It is unthinkable that legislative statements intended to protect seniority systems could be construed as evidence of a Congressional intent to prohibit upon enactment precisely the types of pre-Act systems the bill's opponents vigorously sought to protect. Indeed, because Title VII would not have passed without support of legislators who resisted federal encroachment upon traditional management prerogatives and union freedoms (*United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979)), the only logical conclusion is that post-Act systems were intended to be given the same protections at pre-Act systems.

Moreover, under the Fourth Circuit's interpretation, § 703(h) would no longer protect seniority systems modified by collective bargaining, conciliation agreements or consent decrees, even if the changes were intended to soften the effects of past employment practices. Although voluntary change in employment practices is the preferred means for carrying out the purposes of Title VII, *Alexander v. Gardner-Denver*, 415 U.S. 36, 44 (1974), the circuit court's approach

would penalize and, therefore, discourage such voluntary attempts to ameliorate the application of past systems. Thus, the opinion of the court below flies in the face of the statutory language, is at odds with this Court's decisions and poses a significant threat to the proper administration of the Federal labor and antidiscrimination laws.

ARGUMENT

THE FOURTH CIRCUIT'S CONCLUSION THAT SECTION 703(h) APPLIES ONLY TO PRE-ACT SENIORITY SYSTEMS IS DIRECTLY CONTRARY TO THE STATUTORY LANGUAGE, THE LEGISLATIVE HISTORY AND THIS COURT'S HOLDINGS

A. The Language Of Section 703(h) Is Unambiguously Applicable To All Bona Fide Seniority Systems, And This Court Has Emphasized That Prospective Application Of That Section Is Required By The Nation's Labor Policy

The Court has long recognized that differing industrial circumstances and bargaining goals have given rise to a wide variety of seniority systems and components of those systems. Indeed:

> It is the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static.
>
> * * * *
>
> There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle

> of seniority in the interest of the ultimate aims of collective bargaining. *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 525-26 (1949).

Title VII, of course, was modeled in large part on this pre-existing national labor policy. *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 769 (1976). The Fourth Circuit's construction of § 703(h) as applying only to those particular seniority systems in place as of the effective date of Title VII, however, is antithetical to this labor policy and at odds with the intent of Congress when it passed Title VII.

As this Court has observed, "seniority systems are afforded special treatment under Title VII." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). In unambiguous language, applicable to all bona fide seniority systems,* § 703(h) of Title VII provides, in pertinent part:

> Notwithstanding any other provision of this subchapter, *it shall not be* an unlawful employment

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*The "starting point" in statutory construction is, of course, the language of the statute itself. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). Furthermore, the "literal or usual meaning" of a statute's words should be accepted as controlling unless to do so would "lead to absurd results" or "thwart the obvious purpose of the statute." *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978).

As noted recently by the District of Columbia Circuit, the language of § 703(h) "suggests Congress' simple, but unequivocal, intent to preserve the lawfulness of bona fide seniority systems *even after* the passage of Title VII." *United States of America and Equal Employment Opportunity Commission v. Trucking Management, Inc.*, No. 79-2102 (D.C. Cir., August 14, 1981), slip op. at 16 (emphasis in original).

> practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . *provided that such differences are not the result of an intention to discriminate because of race.* (Emphasis added.)

It is well settled that § 703(h) is a "definitional provision" delineating which employment practices are illegal and thereby prohibited and which are not."[7] Nothing in the statutory language suggests that the immunity extended thereby is to be conditioned upon the date a seniority system is implemented. On the contrary, the *only* prerequisite to the statute's protection is the absence of discriminatory intent in the negotiation or application of the seniority rule.[8]

Not only does the language of § 703(h) embrace all bona fide seniority systems, it is also clear from this Court's decisions that the section is to be applied to systems negotiated or changed after the effective date of the Act. In *Franks*, this Court discussed the im-

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[7] *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 758 (1976). *Accord, Int'l Bhd. of Teamsters v. United States*, 431 U.S. at 346-47 *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 559 (1977).

[8] As the dissent below pointed out, the majority opinion has transformed the unqualified language of § 703(h) into a "grandfather" clause. 634 F.2d at 757 n.1. We concur with the dissent and the arguments of the appellants that Congress undoubtedly knows how to write a "grandfather" clause if it wishes. For example, Congress could have drafted § 703(h) by adding either the word "existing" or "established" to modify the term seniority system. It is inappropriate to read such qualifying language into an unambiguous statutory provision.

portance of seniority systems as being a part of an evolutionary process that looks to future changes and developments as a necessary condition for its continued viability. As the Court stated: "Seniority systems and the entitlements conferred by credits earned thereunder are of vast and *increasing* importance in the economic employment system of this nation. S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management 104-05 (1960). Seniority principles are *increasingly* used to allocate scarce benefits among competing employees . . . and to compute noncompetitive benefits earned under the contract of employment." 424 U.S. at 766, emphasis added.[9]

In this same regard, the Court in *Teamsters* stressed that "Section 703(h) on its face immunizes *all* bona fide seniority systems" (431 U.S. at 348 n. 30, emphasis added), and later added that:

> there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant wide seniority systems. *Then, as now* [1977], seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job,

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[9] *See* Elkouri & Elkouri, *How Arbitration Works*, 3d Edition 555 (1973) ("Modification of prior seniority provisions in subsequent Agreements is a fairly common feature of collective bargaining," quoting *Ford Motor Co.*, 23 LA 296, 297 (1954)). Indeed, "consideration of seniority looms so importantly that it has been said that 'one of the principle purposes for entering into a collective bargaining agreement is usually to secure for the employees the prized right of seniority in case of layoff and promotion.'" Elkouri and Elkouri at 555 (citation omitted).

> or in a line of progression. 431 U.S. at 354 n. 41 (emphasis added).

In no sense did this Court suggest that the statute is limited in the manner adopted by the Fourth Circuit; rather, in a very real sense, the Court indicated the ongoing and developing nature of seniority systems that Congress sought to preserve.

Similarly, this Court's opinion in *California Brewers*[10] repeatedly reflects Congressional appreciation of the evolutionary nature of collective bargaining and of the inevitable diversity of seniority systems that have been and *will be* developed by parties to collective bargaining in diverse circumstances:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *United Steelworkers v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L.Ed.2d 480. It does not behoove a court to second-guess either that process or its products. *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 90 S. Ct. 821, 25 L.Ed.2d 146. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048; *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 69

[10] *California Brewers Association v. Bryant*, 444 U.S. 598 (1980).

S. Ct. 1287, 93 L.Ed. 1513. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703(h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U.S., at 355, n.41, 97 S. Ct., at 1865. 444 U.S. at 608.[11]

While cautioning that § 703(h) would not immunize rules that "depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system," [12] this Court emphasized in *California Brewers* that "[s]ignificant freedom *must* be afforded employers and unions to create differing seniority systems." [13] This language, written

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[11] Congressional deference to the rights secured by seniority systems has been recognized by the Court in a variety of Title VII contexts. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (requirement of § 701(j) of Title VII that employers and unions reasonably accommodate employees' religious practices, absent undue hardship, does not require abrogation of other employees' collectively-bargained seniority rights); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (a bona fide seniority system that perpetuates the effects the employer's past discrimination is nonetheless protected by § 703(h) of Title VII); *California Brewers Association v. Bryant*, 444 U.S. 598 (a seniority system's "ancillary rules" do not fall outside the protections of § 703(h) simply because they do not "operate on the basis of some factor involving the passage of time.")

[12] 444 U.S. at 608.

[13] *Id.*, emphasis supplied. As has been stressed repeatedly, Congress did not want the courts to "second guess" the parties to a collective agreement, but insisted instead that seniority rights vested under any bona fide seniority system be respected, even if the system perpetuated the effects of

almost 15 years *after* the effective date of Title VII, demonstrates that the Court considers § 703(h) to be applicable, *now and in the future*, to the "differing seniortiy systems" that parties to collective bargaining can be expected to create.[14]

The predictable consequences of the Fourth Circuit's holding are at odds with the intent of Congress to encourage the continued resolution of seniority issues by the bargaining process. Section 703(h) effectively would be written out of the statute for parties who negotiate new seniority systems. All new or modified seniority systems would be judged by the *Griggs* standard—a result manifestly at odds with *Teamsters*. See below, pp. 15-18. Consequently, to avoid losing the protections of § 703(h), employers and unions would have a strong incentive to keep the pre-Act systems intact without making necessary or desirable adjustments. Collective bargaining would be stultified in a manner contrary to the teachings of the *California Brewers* decision.

The disruptive potential of the decision below is better understood when one considers a few of the

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prior discrimination. *See, California Brewers Ass'n v. Bryant*, 444 U.S. at 608; *Teamsters*, 431 U.S. at 350-51. *And see Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."); *Steelworkers v. Weber*, 443 U.S. 193, 205-206 (1979); and *Texas Dept. of Community Affairs v. Burdine*, 101 S. Ct. 1089, 1096 (1981) (Title VII "was not intended to 'diminish traditional management prerogatives.' ").

[14] Inexplicably, the Fourth Circuit failed even to mention the *California Brewers* decision, even though it was decided almost one year before the Fourth Circuit's decision.

seniority issues that must be resolved by the bargaining process, each of which can be extremely important for the relations between the employer and employees and between the employees themselves. As pointed out in Slichter, Healy & Livernash, *The Impact of Collective Bargaining on Management* 118 (1960), initial contract language dealing with seniority may give rise to administrative or interpretive problems that must be clarified, modified or changed over time. Questions which arise include: (1) whether periods of absence from work count toward total service (*Id.* at 118-19); (2) what methods should be used to determine the priority among employees with the same seniority date (*Id.*, at 119); (3) what time credit should be given a probationary employee for satisfying his probationary period (*Id.* at 123); (4) on what bases may seniority be lost (*Id.* at 125); (5) whether and to what extent to protect recall and other rights after long or indefinite periods of unemployment (*Id.* at 127); (6) how to adjust seniority for workforces merged during the consolidation of two or more plants of the same or separate companies (*Id.* at 130-31); (7) how to deal with the employment rights of employees who have never worked in the bargaining unit as they relate to unit employees (*Id.* at 132); (8) how to determine the rights of an employee who moves from a bargaining to nonbargaining unit (*Id.* at 132); (9) how to preserve the seniority rights of supervisory personnel who come back to or initially enter the bargaining or seniority unit (*Id.* at 132-33); or (10) how to establish the rights of an employee who moves from one seniority unit to another within the same plant (*Id.* at 134). The peaceful resolution of such basic employment relations questions is the cornerstone of the

country's labor relations policy. The decision below, however, would undercut this policy and create a disincentive to the creative ordering of the relative rights of employees.

In addition, it would be more difficult for parties to Title VII or other employment discrimination litigation to settle cases, because any seniority modification made as part of the settlement would pose a definite risk that the employer's entire seniority system would lose its statutory protection. See footnote 22, below. The Fourth Circuit's opinion thus would undermine one of the most important policies underlying Title VII. In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims. Indeed, "[c]ooperation and voluntary compliance were selected as the *preferred* means for achieving this goal." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Yet, if § 703(h) protection does not extend to new agreements, collective bargaining participants and litigants will have less incentive to negotiate arrangements which, in many cases, could greatly ameliorate the disparate effects of past employment practices, legal or otherwise.[15]

B. There Is No Support In This Court's Decisions Or In The Legislative History For Applying A Different Legal Standard To Post-Act Than To Pre-Act Seniority Systems

Aside from its predictable "chilling effect" on the negotiation and modification of seniority agreements, the circuit court's bifurcated approach to seniority

[15] The negative effect of the decision below on affirmative action is fully set out in the petitioners' brief.

under § 703(h) would lead to non-uniform administrative and judicial application of that section. Thus, as the Fourth Circuit interprets § 703(h), the same bona fide seniority system, neutral on its face and as applied, would be lawful *in spite of* its perpetuation of prior discrimination if it were implemented before July 2, 1965, but it would be held unlawful *because of* such perpetuation if implemented after the effective date of the Act. Indeed, if the Fourth Circuit's view were correct, the neutral seniority systems in *Franks*, *Teamsters*, *Evans* and *California Brewers* would have been unlawful had they been adopted after 1965 if they perpetuated the effects of pre-Act discrimination. Also, the same employer could have similar pre- and post-Act systems in the same plant for different bargaining units which would be judged under different legal standards. This inconsistent result would hinge upon the time of implementation of the system and not upon any characteristics of the neutral system itself. Not only would this anomaly be unprecedented labor policy, as we now show it would render ineffective this Court's prior decisions and nullify the intent of the Congress that enacted Title VII.

Although this Court has analyzed the applicability of § 703(h) in cases involving seniority systems' perpetuation of both pre-Act and post-Act discrimination,[16] the Court never has suggested, as the Fourth Circuit would have it, that post-Act systems should be

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[16] *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324; and *United Air Lines v. Evans*, 431 U.S. 553; *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63.

judged under the *Griggs* disparate impact test, or that the Court's holding depended upon the pre-Act implementation of the seniority systems at issue.

Rather, from *Franks*, *Teamsters*, *Evans* and *Hardison*, it is evident that the Court views Congress's mandate as requiring that analysis of the legal effect of a seniority system proceed differently than in traditional "disparate impact" cases. For as stated in *Teamsters*, "[w]ere it not for § 703(h) the seniority system in this case would seem to fall under the *Griggs* rationale." [17] While the *Griggs* (disparate impact) approach would require that an employment practice fair in form but discriminatory in operation must be justified by business necessity to avoid Title VII liability [*Griggs v. Duke Power Company*, 401 U.S. at 429-32], "§ 703(h) unequivocally mandates that there is no statutory violation in the absence of a showing of discriminatory purpose." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 82, n.13. "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Id.* at 82.

Moreover, the remedial purposes of Title VII can be served fully without changing or setting aside bona fide, neutral seniority systems. As the Court emphasized in *Teamsters*, "Post-Act discriminatees . . . may obtain full 'make whole' relief, including retroactive seniority under *Franks v. Bowman* . . .

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[17] *Teamsters*, 431 U.S. at 349.

without attacking the legality of the seniority system as applied to them." 431 U.S. at 347. The fact that the relief available to discriminatees would not be enlarged by holding unlawful a seniority system that perpetuated the effects of the employer's post-Act discrimination is, as the Court has stated, "simply an additional reason not to hold the seniority system unlawful." *Teamsters*, 431 U.S. at 348, n.30. For the numerous reasons stated above, there is no basis for the Fourth Circuit's holding that effectively reads out of § 703(h) the intentional discrimination language and substitutes the *Griggs* standard.

Because the language of the § 703(h) is clear and unqualified in defining the protections that it affords all seniority systems, it is unnecessary to look to the legislative history which, as this Court has stated, is unusual in light of the "absence of the usual legislative materials" surrounding its adoption. See *Franks v. Bowman*, 424 U.S. at 761. There is nothing in the history, however, that would prevent the application of § 703(h) to post-Act seniority systems. As noted in this Court's discussions in *Teamsters* and *Franks*, the main thrust of the legislative materials was to assure critics of the legislation that it would not disrupt the various types of existing seniority systems, or the rights of employees vested under those systems, which had accrued prior to the enactment of Title VII.

Specifically, the legislative record contains a Justice Department statement and a series of Dirksen-Clark questions and answers to the effect that the statute would not affect bona fide neutral seniority systems

and would not require an employer to change existing seniority lists even though the negative impact of such systems on minority employees was clearly recognized by Congress. *Franks*, 424 U.S. at 759-60 & nn.15 and 16. As set forth fully in the petitioners' brief, the legislative history demonstrates that these statements designed to protect existing seniority systems were not in any way intended to be construed as limitations that somehow imply that post-Act systems were to be judged by a different legal standard.

To the contrary, because the legislative statements were designed to satisfy objections by opponents of Title VII that bona fide seniority systems could be attacked if the proposed legislation were enacted, there is neither logic nor common sense in the Fourth Circuit's reading of such statements as evidence of Congressional intent to invalidate post-Act seniority systems. It is unthinkable that the opponents of Title VII would have supported a bill that would prohibit upon enactment precisely the types of pre-Act seniority systems they so assiduously sought to protect. Rather, the contrary Congressional intent has been recognized by this Court:

> Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." *United Steelworkers v. Weber*, 443 U.S. at 206.

Thus, the history of § 703(h) specifically limits the reach of the statute as it pertains to neutral, bona

fide seniority systems. There is not one word evidencing an intent to invalidate otherwise neutral post-Act systems, or to restrict severely managerial prerogatives in the manning suggested by the Fourth Circuit.[18]

In sum, consigning post-Act seniority systems to the *Griggs* analysis would, with regard to such systems, revive the discredited *pre-Teamsters* principles that discriminatory intent may be inferred, and a Title VII violation found, from a seniority system's perpetuation of the effects of prior discrimination. Because there is no expression of Congressional intent to apply widely disparate legal analyses to post-Act and pre-Act seniority systems, there is no reason to interpret § 703(h) in a manner that causes the section to "self-destruct," and which is, moreover, inharmonious with Title VII's basic goals. It is apparent from the inconsistent and anomalous results that would flow from application of the Fourth Circuit's holding, that Congress did *not* intend that § 703(h) should apply only to pre-Act systems.

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[18] The Circuit Court's opinion is open-ended and could be construed to invalidate an entire seniority system if a component of that system were modified after the effective date of the Act. Take, for example, an employer whose "existing" system was modified on July 3, 1965, to include a probation component of the type approved by the Court in *California Brewers*. If the remaining basic components of the seniority system were then to be judged by the *Griggs* standard because of the post-Act modification, the legislative history approving existing systems would be rendered meaningless. Moreover, as the *Brewers* decision makes clear, our construction of § 703(h) would still permit the proper application of the *Griggs* standard to "practices, procedures and tests" without "swallowing up" Title VII's otherwise broad protections. 444 U.S. at 608-09.

CONCLUSION

Congress intended § 703(h) to immunize from Title VII liability the operation of bona fide seniority systems, even when those systems tend to perpetuate the effects of prior discrimination. Nonetheless, Title VII's remedial provisions permit, and § 703(h) does not bar, an award of retroactive seniority to remedy timely-charged post-Act discrimination. Victims of such discrimination may thus be "made whole" without judicial invalidation or modification of neutral seniority systems which, in their application, have perpetuated the discriminatory effects. Within this context, it is clear that the Fourth Circuit's attempt to limit § 703(h)'s applicability to pre-Act systems not only is unsupported by legislative history and this Court's holdings, it would undermine important tenets of the national labor policy reflected in Title VII as a whole. This Court should, therefore, reject the Fourth Circuit's reading of § 703(h) and make it clear that any seniority system, whenever negotiated, is protected by that section unless it is demonstrated that intent to discriminate entered into the system's negotiation or maintenance.

Respectfully submitted,

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